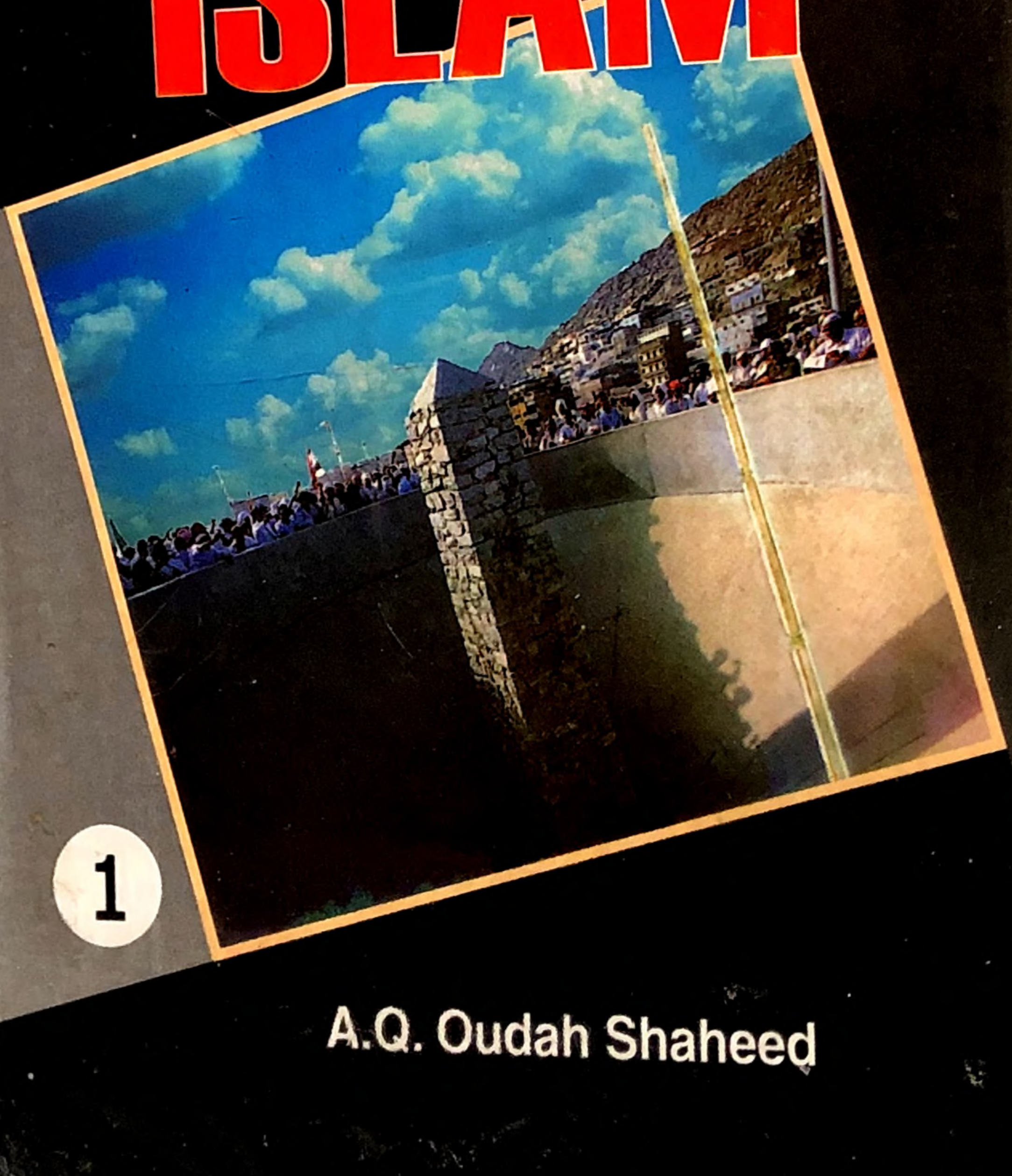
CRIMINAL LAW OF ISLAM



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A.Q. Oudah Shaheed

This book is comprehensive study of the Islamic Criminal Law of Islam and the Modern Law. It essentially consists in an enquiry into the respective principles and theories underlying the Islamic Laws and other Laws and aims at identifying the points of difference and similarity between them.

CRIMINAL LAW OF ISLAM

Vol. 1

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CRIMINAL LAW OF ISLAM

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INTRODUCTION

(1) Subject of Present Study

This book is a Comparative Study of the Islamic Criminal Law of Islam and the Modern Law with particular reference to Egyptian Law. It essentially consists in an enquiry into the respective Principles and Theories underlying the Islamic laws and other laws and aims at identifying the points of difference and similarity between them. May Allah grant me the strength and guidance to accomplish this noble task. After the completion of the work in hand I propose to under-take a comparative study of Civil Laws as well.

(2) Subject of Volume I

The present volume has been divided into two parts. Part I treats of the general aspects of criminal law while Part II deals with the particular aspects thereof.

(3) The Significance of a Comparative Study of Islamic and Modern Law

I have made every possible effort to include in this book a discussion of all the major and minor problems of criminal law and leave no doctrine or principle untouched so that my readers may be thoroughly acquainted with the criminal law of Islam in all its aspects and familiarized at the same time, with the similarities and dissimilarities between them. Another reason for making the study comprehensive as far as possible, is to forestall any objection on the part of a skeptical reader to the omission of certain problems while discussing certain others.

However, this study does not cover early phases of modern law; nor does it involve a comparison between the Islamic law and the man-made law which existed in the seventh century; for the latter did not attain that degree of perfection which would warrant its comparison to Islamic Law. It consists in a comparison between the Islamic and the modern law, or rather between a developing and ever-changing law which has been described as

a law moving ahead towards perfection and the Shariah which was revealed fourteen hundred years ago and which is not amenable to change, Shariah, a masterpiece of divine creation does not stand need of improvement. In other words the present study is a relative assessment of new and old laws or a comparison between an ever-changing law and immunable ancient law. It will prove that this ancient law is far superior to the modern law, in spite of its hoariness. In fact, it will be nearer the truth to maintain that the modern law, with all the latest views and elaborate doctrine and principles that it comprehends, is very-very low on the scale of development as compared to the Islamic Shariah.

My contention may astonish some people, since truth has become unfamiliar in the world today. However, those whom Allah has endowed with reason and understanding can certainly distinguish between good and evil.

No doubt the new is better than the old but this holds good only when both the new and the old are man-made. But nothing new can stand comparison with anything old made by Allah, the Almighty.

Allah sent Moses (A.S.), Jesus (A.S.) and Muhammad (S.A.W.) as his Messengers and revealed to them the Torah, the Gospel and the Quran respectively. Will it be proper, then to compare those Apostles with common humans? Can man produce the like of any of the holy books revealed to them. Allah has created heaven and earth and subdued the Sun and the moon for our sake and has made us human being. Can man make all these things? The truth of the matter is that man is incapable of even understanding what Allah has created. It is, of course, comprehensible that a thing made by one man can be placed against the one made by another. But to compare a man-made thing with divine creation would be simply unreasonable. Those who can realize the difference between human production and divine creation can clearly understand the difference between man-made and God-made laws. One, who cannot realize this difference, must be astonished at our observations. Such a person should, as a matter of fact, be amazed at his own incapability to understand something so clear and evident.

(4) Different Schools of Islamic Jurisprudence

This study is not confined to any one school of Islamic Jurisprudence. It is rather based on all the four well-known schools including Maliki, Hambali, Hanafi and Shafei. Whichever School of Thought among them has been found relevant to different aspects of the subject, has been dwelt at length. I have also tried to discuss in detail the causes of difference between them so that my readers may be fully acquainted with distinguishing characteristics and respective approach of each school.

(5) Reason for Restricting Present Study to Four Schools

I desired to represent in this study the viewpoints of the Khariji and Zahiri schools as well, but the time and resources at my disposal were too limited to fulfil this desire. My handicap is that I have to spend most of my time in rural areas on official business where there are no libraries, and no books available. That is why I have had to rely occasionally on my memory and content myself with whatever matter I could lay hands on. The biggest obstacle in my way was the shortage of time as all my time was taken up by official duties. I had, therefore, to snatch away a few hours from my leisure time for this work, while all my summer vacations were devoted to it. It was thus that I managed to complete my study under the circumstances just referred to. I could not but decide to discuss only four schools of Islamic jurisprudence, leaving out others for the time being. I hope to be able to make up this deficiency in the next edition of my book.

(6) Language of the Book

I have deliberately avoided in this book the use of traditional jargon of our jurists. One reason is that I cannot imitate their subtle and elaborate style. Another reason is that this style is not comprehensible to the general readers of the present age. Hence I thought it fit to use modern legal terminology. However, I have tried to retain the Islamic legal terms, giving, where necessary, the modern equivalents of those terms. Besides, I have taken great care to give references of the sources I have drawn upon.

One of the reasons for preferring the modern style in this book is to make it easier for my readers. It will thus be helpful

to the modern educated people in grasping the meanings of Islamic law without studying the original books of Islamic jurisprudence. In fact this volume will facilitate the study of those books which are written in a style too abstruse and succinct for the modern reader to comprehend. Nevertheless, in spite of adopting modern style I have not been able to get clear of the influence of our old jurists, inasmuch as my study of them over a long period of time has left deep impression of their jargon on my mind. For this reason, my readers will come across through these pages the vestiges of the form in which books on Islamic law are being written. But I am confident that this influence will be beneficial to my readers, bringing their minds closer to the books in question.

(7) The Islamic Jurists and the Interpreters of Modern Law

I have reserved the word 'faqih' or 'jurist' in this book for the scholars of Islamic Shariah and the word 'interpreter' for the modern legal expert lest the latter should be confounded with the 'Faqih'. The differentiation between the two groups of scholars has mainly been necessitated by their procedures which are specifically different from each other. The terms employed for them here are based on the nature of their respective tasks; for the scholar of Shariah interprets provisions that are far less in number and most of his work consists in the inference of principles, canons and rules applicable to those provisions in the light thereof. In this way his task of interpretation is reduced to a large extent, while that of reasoning and intellection is increased. For this reason I have applied the term 'faqih' or jurist to him. As distinct from the faqih, the scholars of modern law explain and interpret countless legal provisions. They, of course, often do deduce some new principles and theories, but their task of inference is much less than that of interpretation and explanation. For modern law contains provisions applicable to all sorts of incidents that may have already taken place or are likely to occur. That is why the task of the modern legal expert does not involve much thinking and deducing. He therefore, focuses his full attention on the task of construction and explanation. Hence he has been called here 'interpreter'.

(8) Reasons for Beginning with Criminal Law

I have begun this comparative study with the criminal law since it is this part of the Islamic Shariah which has suffered the greatest injustice and has been abandoned as impracticable. The only element of Islamic law included in the modern curricula is the one known as Personal Law'. It is, therefore, the only part of Islamic law which the modern scholars study. Apart from this all the other Islamic laws, particularly the civil and criminal laws have now become totally obsolescent. That is why modern scholars of law are absolutely ignorant of the provisions relating to the criminal and civil laws of Islam. But we admit nevertheless that in civil matters the Islamic Shariah occupies a position that is by no means inferior to modern law.

The reason for our acknowledging the excellence of the Shariah is that the modern legal experts are obliged to refer to the Shariah in certain civil cases, for the provisions relevant to the problems raised by them are in reality derived from the Shariah. These Provisions, although limited in number, give a salutary impression of the Shariah. Another reason for the acknowledgement of the superiority of the Shariah is that Muhammad Qadri Pasha's book entitled 'Murshid-ul-Hairan' has made it easier to compare and contrast the Islamic Shariah with the modern law in accordance with the principles laid down by Imam Abu Hanifa. He has in this book compiled the Civil Laws of Islam on the pattern of modern law under different chapters and sections in accordance with the method of Imam Abu Hanifa. This book by Mr. Qadri Pasha has facilitated a comparative assessment of Islamic and modern civil laws. It is now possible in the light of this work to ascertain without referring to the books on Islamic jurisprudence, the points of harmony and dissimilarity. But a knowledge of this would be of no avail unless the reader of the above volume is not only well-versed in the provisions of the Shariah and its general principles but is also acquainted with the jurisprudence of other creeds.

The general impression of the legal -experts about the criminal law of Islam is that it is not in tune with the *zeitgeist* and is, therefore, not applicable to modern conditions; nor does it come up to the standard of modern laws. This is so misleading a notion

that if any-one with a little sense of justice analyses it, he will come to the conclusion that it is rooted in sheer ignorance. He will rather be surprised to find that we have given our verdict against the civil law of Islam without having any knowledge of Islam at all and without knowing even the A B C of its civil law.

What is more regrettable is that this wrong notion has been widely accepted by the students of law and legal experts as a unanimous verdict, notwithstanding the fact that it owes itself to the ignorance of Islamic Shariah and is far from being true. In order to find cut the fallacy of this notion, one should study authoritative books on the Shariah. One will learn from those books that each and every principle and doctrine of the Shariah gives the lie to it.

When this misconception about the Islamic Shariah became clear to me I considered it incumbent upon my-self to dispel it. I, therefore, embarked upon the task beginning with the criminal law of Islam which we have abandoned and thrown into oblivion without any reason whatsoever. The present volume aims at an exposition of the Islamic Criminal Law in its true form and attempts at the same time, to prove that it is not only superior to all the modern laws but also applicable to contemporary conditions and pregnant with potentialities of application to the future in exactly the same way as it had been in operation in the past.

(9) Why I Studied Islamic Law

I began to study Islamic Law in 1944. Before that I had no interest in the subject. I rather read books on Islamic history or the biographies of historical personages of Islam with great relish. One generally does not come across legal problems in Islamic history. However, in the biography of some great Muslim figures one does meet with some allusion to a judgment or verdict he might have passed or conclusion he might have drawn, which is often so illuminating and thought-provoking that it kindles the spirit of comparison in a scholar and creates in him a sense of pride in the Islamic Shariah. I was amazed to note that in any judgment or conclusion I came across in the above books, all those elements and principles of modern law were kept in view which we are taught in our educational institutions to have been

introduced only after the French Revolution in the 19th Century. The contradiction between what I had been taught and what I read in the biographies in question was so obvious that I could not but decide to make a systematic study of the criminal law of Islam, which finally led me to the conclusion that we were absolutely ignorant of this law which was by far the best of all the laws in the world.

(10) Rearrangement of the Texts of Books on Jurisprudence

I encountered considerable difficulty during my study of the criminal law of Islam; for I had, in the first instance, no knowledge of the theory and terminology of Islamic jurisprudence, nor had I any experience of reading old hooks on the subject. Those books do not contain a list of contents, making it extremely difficult to trace in them provisions relating to a particular problem. One has to read a whole chapter at a stretch before one is able to find any such provision therein. Sometimes it so happens that the students' strenuous search for a problem yields no result and he is about to abandon it as a hopeless job when, all of a sudden, he hits upon the relevant problem quite unexpected.

The jurists of different schools do not follow any one prescribed method. For instance, in a book written by the jurist of one school a certain problem is treated in the beginning, while in a book written by one belonging to another school, the same problem is dealt with towards the end. Again, the same problem is discussed in different chapters by the jurists of different schools. It must also be borne in mind that the style of the ancient jurists of Islam is difficult and succinct. They simply adumbrate the injunctions with respect to certain problems without giving their causes. This method is particularly followed in short books on jurisprudence.

No doubt, a comparative study of different schools of jurisprudence in itself is an irksome job. In course of my research I had to study four books of the four major schools of Islamic jurisprudence simultaneously. However, I gained a lot from this process which did not only make it easier for me to understand different problems of jurisprudence but also enabled me to have a full grasp of those fundamental elements on which the jurists

have based their respective theories. Moreover, this comparative study helped me in identifying the niceties between the standpoints of the different schools.

I confess that when I first studied books on jurisprudence, I was unable to understand them fully. In fact certain conclusions drawn by me during the first reading of those books proved erroneous on a second reading. For this reason I had to read them three or four times and read them on till I developed juristic acumen. Also, I had to study the same subject again and again and go through books by the authors belonging to the same school, since I was making a comparative study of the four major schools of Islamic jurisprudence. At the initial stage I was able to lay hands only on a few books. I then started a strenuous search for books and was thus able to study more extensive works. However, despite all my endeavours, I do not claim that the present work is free from mistakes. After all I am a human being and nothing human can be perfect. Yet I have taken meticulous care to make it as correct as possible. Nevertheless, if any scholar identifies the errors I may have committed herein, I shall be thankful to him and will rectify them in the next edition of the book.

In consequence of the endeavours 1 have had to make to acquaint myself with the provisions of the Shariah and from the illuminating results thereof, I came to know how the modern legal experts are labouring under misapprehension about the Islamic law. So I realised that it was incumbent upon me to present the criminal laws of Islam in a language comprehensible to the legal experts as well as the modern educated men so that they might become familiar with them, and to dispel at the same time, the misunderstanding about the laws in question and to unveil those realities again that have for centuries remained concealed.

(11) Method of Study Adopted in This Book

The readers will notice that in arranging the text of this book I have followed the same method as is generally adopted in the modern law books. The purpose of this method is to familiarise the legal experts with the subject matter of the book and to kindle in them the real interest in it so that they may feel at home with the subject, study it with relish and may easily trace

the problems they may be looking for, since they have been arranged and discussed in the same order as they are accustomed to.

The jurists, like the modern legal experts, do not differentiate between the general and the particular. In fact, the former while dealing with specific crimes, freely discuss general principles and rules when necessary. I, however, have for the sake of simplicity and keeping in view the order in which problems are discussed, drawn a clear line of distinction between the two categories and have accordingly presented the respective provisions relating thereto separately. In the deduction of general principles and their arrangement I have had to study the problems of huds, qisas and punishments intensively, or to be more correct, I ceaselessly studied all the works on crimes and have finally set them forth in a systematic manner.

(12) Is Islamic Law Out of Harmony with Contemporary Conditions?

On the basis of my comprehensive study of the Islamic law I maintain that the view declaring this law as incompatible with the demands of modern age is untenable, as it is not the result of research or logical reasoning. In fact academic research and logical arguments lead to the conclusion that Islamic law is specifically different from all human laws and is applicable to the conditions of every age.

There are two distinct groups of people who hold the view that the legal system of Islam is out of tune with the Zeitgeist. Of these the one has no knowledge of either the Islamic law or the modern law, while the other is acquainted with the modern law but knows nothing about the law of Islam. In other words both the groups are incompetent to make any comments on the Islamic law as they are absolutely ignorant of it. You cannot obviously pass judgement on a thing which you are absolutely ignorant of.

In fact, the view that the Islamic law cannot meet the requirements of modern age is an erroneous assumption rather than the result of academic research. What the students are taught today is that there is no relationship between the modern legal

system and the laws that were in force till the end of eighteenth century and the beginning of the nineteenth centuries and that the contents of modern legal system consist in philosophic doctrines and accepted canons of humanism and social life, of which the old laws are absolutely devoid. Comparison between the two legal systems have led them to believe that old laws are inapplicable in modern conditions. So far as the manmade laws are concerned, this is, of course, true. But they err in their judgment when they draw an analogy between the Islamic law and the man-made law. i.e. when they think that inasmuch as all the laws which were in force till the end of the 18th century are out of tune with the Zeitgeist, the legal system of Islam too must be regarded as out-dated since it was enforced during the middle ages and some of its elements remained effective down to the beginning of the 19th century. This line of argument involves a grievous fallacy that cannot escape the notice of a man of insight.

(13) The Fallacy of Analogy between the Islamic Law and the Man-Made Law

The springs of the error involved in this tenor of argument lie in the inability of the above groups of people to distinguish between the human and the divine laws. They visualise the heaven in the image of the earth and the maker of man in the image of man. Evidently, no sensible person would consider it right to compare himself with the Creator of the universe and draw an analogy between the earth and the heaven. To sum up, these people do not differentiate between the divine law and the human law which are specifically different. However, the distinction between the two kinds of laws and their scopes will come into full relief as we consider the way they have evolved and discuss their respective nature and characteristics.

(14) A False Syllogism

If it is true, then, that the human and Islamic laws are specifically and essentially different from each other, it will be a false syllogism according to the rules of logic, to draw a conclusion from premises denoting two unequal things of different orders.

The view that the Islamic law is outdated has originated

from fallacious thinking. It has been assumed that the old man-made laws are not in harmony with the zeitgeist and as the Islamic law is also old, it too is not in harmony with zeitgeist. But since the Islamic and human laws are not of the same order, the syllogism is false. False propositions proceed from false propositions.

We shall now discuss the evolution of the Islamic and customary laws, identify the causes of difference between them and explain their distinctive qualities. This discussion will bring home the specific difference between the two kinds of laws to those people also who cannot discern it. They will consequently realise that the Islamic law is characterised by certain basic qualities which are not to be found in the customary or conventional laws.

(15) The Evolution of Customary Laws.

The customary law, at the initial stage, is very weak and comes into being with an extremely limited number of rules. The society in which it comes into being codifies and enforces these rules. As the society rises in the scale of evolution, its law develops correspondingly with a tempo proportional to the pace of social progress. As the needs of the society multiply and diversify, and as it is enriched with the wealth of thought, knowledge and manners, its scope progressively expands and its principles become more and more inclusive. In other- words customary law is born weak and feeble like a baby and then gradually grows and gets stronger till it attains maturity. As the tempo of social progress is accelerated, the development of law through various stages is correspondingly quickened and vice versa. In other words the society brings forth the law to fulfil its needs and regulate its life. But the law is always governed by the society and its progress is dependant upon social progress.

Hence the scholars trace the origin of human law to the emergence of the family and tribe. At this stage of corporate life, the word of the head of the family was a law to its members and the order of the tribal chief was binding on every individual belonging to the tribe. In this way the customary law developed with the growth of the society till the birth of the state. In the beginning, the ways of one family differed from those of another. Similarly the traditions of various tribes were not in harmony

with one another. With the emergence of the state the family customs and tribal traditions were harmonised and the people constituting the state derived general laws from those customs and traditions. The laws thus formulated were binding on every citizen of the state. Nevertheless the laws of one state did not accord with the laws of another state. It was towards the end of the eighteenth century that in the light of new philosophy and the scientific and social doctrines, the last phase in the evolution of human law began. From that period down to the present day human law has made progress by leaps and bounds. The edifice of modern legal system has been raised on bases unknown to ancient law. These bases consist in the principles of justice, equality, mercy and humanism. With the propagation of these basic doctrines the laws and regulations in force all over the world have assumed uniformity to a certain extent. However, there is a world of difference in matters of details and delicate points between the respective laws of modern states.

This then, is a brief account of the evolution of human law from which it may be clear that it was quite different in its initial stage from its modern form and that it has come to be what it is after undergoing an endless process of evolution extending over thousands of years.

(16) The Emergence of Divine Law.

The Islamic law has not come into being the way the conventional law has. It has not had to undergo the same process of evolution as all the man-made laws have done. The case with the Islamic law is not that it began with a few rules that gradually multiplied or with rudimentary concepts refined by cultural process with the passage of time; nor did this law originate and grow along with the Islamic community.

On the contrary the Islamic law was complete, comprehensive and perfect in all respects right at the time when Allah revealed it to His Apostle Muhammad (S.A.W.). There was not a flaw in it. Again, the entire Islamic law was revealed within a very short period extending from the conferment of prophethood on Muhammad (S.A.W.) to his demise or up to the time when the following verse was revealed:

"This day have I perfected your religion for you and completed my favour unto you and have chosen for you as religion Al-Islam."

This law is not meant exclusively for any particular community, nation or state. It is actually designed for the entire humanity including the Arabs as well as the non-Arabs the people of the East as well as of the West, however vast the difference may be between their mores and customer traditions and history. It is intended for every family tribe, community or state. In fact, it is such a universal and all embracing law that the legal experts have not been able to produce the like of it in spite of the fact that they have long been pondering over it.

The divine law of Islam is complete in every respect and there is nothing which it does not cover. It is all-inclusive and contains solution to any problems that may arise out of all sorts of circumstances. There is a provision in it for every possible situation. Besides, the Islamic law contains provisions relating to all the problems and affairs of all the individuals, communities and states as well.

It includes provisions regulating personal matters and individual problems as well as those of governments, states and social-political affairs. Thus it also deals with relations between nations both in peace and war.

It is also to be emphasized that the law of Islam was not revealed for application to the situation of a particular age or conditions prevailing at a certain period of history. It is meant for all times and is valid as long as man exists on earth.

Allah has made this law in such a way that temporal changes can make no impact upon it. It does not become antiquated or outdated. Its fundamental principles are invariable. It is applicable in all conditions because of its generality and dynamic character That is the reason why the need for its modification does not arise at all as it does in the case of ordinary man-made law.

What distinguishes the Islamic law from the ordinary law is that it has been revealed by Allah and His word is not amenable to change

"There is no changing in the words of Allah." (10:64)

Allah knows the unknown. He is omnipotent and can lay down such rules for human beings that may be suited to every age. But the laws devised by man can fulfil only the needs of the time. Since man is ignorant of the unknown, the laws made by him cannot be applicable to unexpected, and unforeseen circumstances.

All the modern doctrines that the human law has been able to imbibe through ages of evolution were originally included in the Islamic law right from the very beginning. Although the man-made conventional law came into being much earlier than the divine law of Islam, it has not been able to develop all those excellencies by which the Islamic Shariah was characterized the very day it was revealed. In other words the Shariah embodied in its original form all the sublime principles that the legal scholars so earnestly desire to be enforced today.

(17) No Similarity between Islamic Law and the Man-made Conventional Law

In view of the manner in which the Islamic law has come into being and the way the human law has developed, we hold that there is no affinity between the two categories of law and that they are not two things of the same order capable of comparison. In fact, the nature of Islamic law is different from that of conventional law. Had the two been specifically identical, the original form of the Islamic law would not have remained intact. It would rather have been revealed in rudimentary form first and then developed along with the growth of society through various stage-it would not have contained the modern doctrines which the human law has been able to develop through ages. It would, as a matter of fact, have assimilated these doctrines thousand of years after they had already become a part and parcel of the communal law.

Having been acquainted with the historical backgrounds of Islamic and human law respectively, the readers can now easily grasp the numerous differences between the two and discern the distinguishing marks of the Islamic Shariah. They need no help to be able to identify the distinguishing characteristics of the two laws and pick out those of the Shariah. However, I deal here with

some of the latter. A discussion of them will exclude the need of explaining others.

(18) Fundamental Difference between the Islamic Law and Human Law.

The Islamic Shariah is different from the Human Law in these respects

(i) Ordinary law is the creation of man, while the Shariah is divine revelation. Thus the two reflect the qualities of their respective makers. As the ordinary law is the result of human efforts it is imperfect, apologetic weak and inadequate. That is why it is constantly subject to change and modification — a process which we term as "evolution." As the society develops and reaches a stage unexpected and unforeseen, so also does the customary law grows or assumes such forms as may not have been envisaged in advance. In other words the human law is imperfect in every respect and cannot attain perfection until man himself becomes perfect. But the truth of the matter is that he can only trace his past to a certain extent and is incapable of knowing the future.

The Islamic Shariah, on the contrary, has been made by Allah himself and reflects the Maker's perfection, glory and the light of omniscience which covers, in a sweep, all the possibilities of both the infinite past and the infinite future. The Omniscient Being has made the Islamic Shariah in such a manner that it embraces all the affairs and problems of the present and the future. The Almighty Allah has ordinated that there shall be no modification of His law since no change of time or space or the vicissitudes of human circumstances necessitate any amendment there-in:

"There is no changing in the words of Allah." (10:64)

What I have stated above, may be hardly credible to some people as they do not believe at all that Islamic law has been revealed by Allah. I care little for such people, although I want them to acknowledge the qualities of Islamic law I have alluded to. I will show that it abounds in such qualities. Those who deny the divine character of Islamic law should try to find out why it

is full of the virtues while other laws are absolutely devoid of. They should at the same time enquire as to who could be the maker of the Islamic Law. When I discuss the virtues of this law, I shall give reasons for the fact that it has been made by Allah, the proof thereof will be found everywhere in this book.

But the people, who do believe that this law is Allah's revelation will readily acknowledge that it contains many a quality which is not to be found in human laws. They need no tangible proof for believing in this; for, as the logical result of what they have accepted a priori, they will believe also that Shariah has many such qualities as mark it off from the man-made law.

The people who believe that none but Allah has created heaven and earth, caused the sun, the stars and the moon to move in the fathomless ocean of the universe, subjected the mountains, the air and the rivers to the principles laid down by Him, shaped the human features in embryo, created an eternal system for inanimate matter, plants and animals in which invariable order reigns, and which never calls for a change, do also believe that Almighty Allah has made certain invariable laws to govern the nature, movements and inter relations of things as well. These natural laws are so beautiful, marvellous and perfect that the human mind cannot even conceive of them. The people who believe in all this and also believe that Allah has made everything in this universe with consummate craftsmanship will, with full conviction, have faith in the fact that Allah has designed the Islamic law for all people and nations and governments. He has revealed it complete, invariable and impeccable so that it may remain eternally in force. This divine law is exquisite, wonderful and marvellous beyond human imagination.

However, if any believer still wants logical proof of what I have asserted, he should wait a little along with the agnostics. The proof will be given at appropriate place. Nonetheless, it is quite possible that he may come across every where in these pages the required proof to his entire satisfaction.

(ii) Customary law is the code of provisional rules which a society lays down to regulate its affairs and fulfil its needs. But these rules are not the forerunners of a society.

They rather emerge in the wake of a social set-up or are at the same level of development as the society. But with the passage of time they are outpaced by the society, inasmuch as the pace of social change is greater than the tempo of change in the customary law. Manmade law, in short, is a collection of provisional rules which are in harmony with the social needs of a particular period and no sooner the society undergoes a change than its laws are inevitably modified.

As opposed to the human law, the Islamic Shariah is a code of rules which Allah has formulated to regulate the affairs of the human society at all times. It bears affinity to the human law since both the laws aim at the regulation of social affairs. But it differs from the latter because it is everlasting and is not amenable to change. Invariability, then, is the characteristic that is not found in any law other than the Islamic Shariah.

Two logical conditions are involved in this distinct aspect of Islamic law

(a) The provisions and rules contained therein must be universal and so flexible that they could be applicable to all the problems arising in every age, in every phase of social development and in the ever-changing conditions of the society and could fulfil the multifarious social needs at all times.

(b) These provisions and rules must be so sublime and so highly developed that they never fall below the social standard at any time.

Both these qualities are to be found in the Islamic law to the highest degree. In fact, it is by virtue of these qualities that the Islamic Shariah is superior to all the mundane and other divine laws. The provisions and rules of the Islamic Shariah possess the qualities of flexibility and generality in the superlative degree and are at the same time so sublime and developed that man cannot imagine.

The Islamic Shariah was revealed thirteen hundred years ago. During these long centuries the human societies have been completely transformed. Man's ideas and modes of thinking have totally changed. Innumerable inventions have since been made

and new disciplines and branches of knowledge have emerged. These are the things of which the ancients could not even dream of. The customary law has been continually modified to suit the new conditions and the modern milieu with the result that there seems to be hardly any relationship between the modern law and the one in force at the time of the revelation of Islamic Shariah. Despite the constant process of change of which the conventional law has been subjected and despite the fact that the Islamic Shariah, on the contrary, is immutable, the contents of the latter are far higher than the standards of human societies and are far more conducive to the solution of human problems than the modern law. Besides, it is much more in harmony with the human temperament and provides greater guarantee of peace and tranquillity for humanity.

This was the historical proof of the superior qualities of the Islamic Shariah. Better evidence of it still is to be found in the Shariah itself. The following words of Allah may be cited in this connection:—

"And whose Affairs are a matter of counsul." (42:38)

Another proof is provided by a Tradition of the Holy Prophet (S.A.W.); —

"Islam does not approve of inflicting harm on any body on one's own initiative nor does Islam deems it fit to do harm vindictively."

A consideration of the precepts contained in the Quranic verse and the Holy Prophet's saying quoted above will show how comprehensive, flexible and simple they are. There can be nothing more comprehensive, flexible and simple indeed. These precepts lay down consultation as a principle of government so as to prevent any harm either to the system or the individuals of the society. By virtue of this principle the Islamic law has proved to be too sublime for man to attain to its heights; for it makes incumbent upon individuals to consult one another in a manner that it is not harmful to anybody nor involves any attempt to inflict harm. I wish that this principle operates in the world today.

If we examine other precepts of the Islamic Shariah, we shall find similar qualities of comprehensiveness, sublimity and elasticity; or rather, whenever we come across a precept of the

Islamic Shariah these characteristics are evident in it and we realize them at once. For example, let us take the following verse of the Holy Quran:—

"Call unto the way of the Lord with wisdom and fair exhortation, and reason with them in the better way."
(16:125)

This precept, flexible and universal as it is, contains the best principle — a principle that cannot be surpassed by anything discovered by men and the human intellect can't produce a better principle for the missionaries for calling the people to the right path. It enjoins upon them that they should propagate their message in a judicious manner and by giving good counsel and that they should have disputations for the purpose in the best manner.

Again, the following verses of the Holy Quran are to be carefully studied:

"And no burdened soul can bear another's burden."
(25:18)

"Lo! Allah enjoineth justice and kindness, and giving to kinsfolk and forbiddeth lewdness and abomination and wickedness." (14:90)

"Lo! Allah commandeth you that ye restore deposits to their owners, and, if ye judge between mankind, that ye judge justly." (4:58)

"And let not hatred of any people seduce you that ye deal not justly. Deal justly, that is nearer to your duty."
(5:8)

"O ye who believe, be ye staunch in justice, witness for Allah, even though it be against yourselves or (your) parents or (your) kindred." (4:135)

As a result of a careful study of the above verses of the Holy Quran, the readers will realize how comprehensive and flexible are the precepts they embody. They are also sublime beyond human imagination.

(iii) The society frames a law and moulds it according to its customs, traditions and historical background. In other words, law is intended for the regulation of the affairs of the society and not for its guidance. That is why law cannot

keep pace with social change, inasmuch as it is the product of the society and not the other way about.

The springs of human law lay in the process of social change right from the very beginning. But in the twentieth century particularly after the first world war this base of the human law began to undergo a radical change. The nationalist states of contemporary world are champions of new movements and systems. The law is made to subserve these movements and systems and thereby provide guidance to the society and be instrumental in the achievement of certain preset goals. Soviet Russia was probably the first to adopt this course followed by the modern Turkey of Kemal Ataturk. Fascist Italy and Nazi Germany followed suit. Later other nationalist states adopted the same course. Consequently law in the present day world has assumed the dual role of regulating the social affairs on the one hand and provide on the other such guidance to the society as the people at the helm of affairs may deem fit in the collective interest.

As regard the Islamic Shariah we have already seen that it is not the product of human society; nor is it subject to latter's development. It is the creation of Allah who has created every thing strong and steady.

The social pattern is indubitably the product of Shariah and vice versa; for the role of Islamic Shariah like that of original man-made law is not limited to mere regulation of social affairs. Its primary aim is to produce some righteous individuals, bring forth a good society, constitute an ideal state and finally to bring into existence an ideal world. That is the reason why the provisions of the Shariah were loftier at the time of their revelation and continue to be loftier than the mundane standards of the highest order. This divine law contains principles and doctrines which the world has been able to arrive at after centuries of progress. It has other principles and doctrines that it has yet to attain to. Allah has made the Shariah a model of perfection and revealed it to His Prophet Muhammad (S.A.W.) so that mankind might obey him, try to imbibe cardinal virtues, elevate itself to the level of perfection and approximate to the standard determined by the Shariah.

The will of Allah was translated into reality and the Shariah served the end for which it was revealed. It turned the graziers of camels into the rulers of the world and the nomads of the desert into the teachers and leaders of the entire mankind.

The Shariah continued to play its role as long as the Muslims acted thereon. When the Muslims of the earliest period strictly abode by it and lived up to its tenets, they rose to the level of world's leadership within a short span of twenty years in spite of their numerical insignificance. So great was their power and glory that no voice other than theirs was to be heard in the world and no slogan other than theirs was raised.

Obviously, it was Shariah which transformed them. It was Shariah alone which educated them, taught them morals and manners, softened their hearts, refined their modes of thinking, inculcated in them the sense of honour and goodness, enforced equality and created in them a passion for justice and taught them that they should co-operate with each other in matters of morality and righteousness. It prevented them from sins and excesses, enlightened their dark minds, delivered them from the shackles of lust and taught them that they are the best people on earth created for the sole purpose of disseminating virtues, checking vices and having unshakable faith in Allah.

The Muslims remained at the zenith of their glory so long as they adhered to Shariah. But when they threw it into oblivion and ceased to abide by its injunctions, their progress came to a stand still and they retrogressed into the same darkness of ignorance in which they had been wandering before embracing Islam with the result that they grew increasingly weaker and finally fell a prey to foreign domination. They had no power to resist any aggressive act committed against them.

Confronted with adversities, the Muslims in the contemporary world believe that the key to the progress of western world lies in its law and way of life. Hence they try to emulate the West. But this attempt has led them even farther away from the right path. It has aggravated their plight still further and doubly weakened them. In fact, by adopting the western system the Muslim nation has split up into groups and factions, each group boasting of

what it has done. These Muslims are simply wasting their energies. They appear to be united overtly, but their hearts have fallen a prey to discord and dissension.

When Allah is willing to ameliorate the lot of Muslims, they shall believe once again that the Islamic law is impeccable and comprehensive; that it contains the golden principles of social progress for every age and that these principles are even superior to all the laws in force in the present age of advancement, inasmuch as it aims at establishing a righteous milieu in all conditions, leading it on the path of persistent progress and finally to the highest stage of perfection.

For a right thinking person the history of Muslims is replete with lessons. It tells us that it was Shariah alone which gave birth to the Muslims, raised them above all the nations of the world, set them on the path of progress and thus enabled them to become the rulers of the world. The history of Muslims also teaches that it is inevitable for their advancement and perfection to implement the Shariah again, as the Muslims owe their origin to it alone and their existence is subject to the existence of Shariah and is inseparably linked with it and that the key to their power lies in the power of Shariah alone.

Before passing on to the next topic, I want to tell my readers that it is now only its present and final form that modern law has undergone a radical change and has assumed the role of guiding the society in addition to its original function. This new concept of its role has actually been derived from the Islamic Shariah which, as its fundamental function, shapes and organizes the society as well as performs the task of guiding it. In other words the principle with which the Shariah began thirteen hundred yeas ago, has now been adopted by the modern law as a new doctrine and the legal experts claim that they are the exponents of this doctrine. But their claim is totally false. They actually follow the Islamic Shariah.

(19) The Essential Qualities of Islamic Law which distinguish i from other laws:—

Having indicated the fundamental difference between the Shariah and other laws, we now proceed to explain the essential

qualities of the Shariah which mark it off from all the other laws. Now the points of difference between the Shariah and the human law also constitute the basis on which the former is distinct from and superior to the latter. Hence, in view of the above difference it may be asserted that the Islamic law is different from and superior to other laws in respect of three qualities which are as follows

(a) Perfection

The Islamic Shariah is superior to other laws by virtue of its perfection. It contains all the rules, principles and doctrines required by a law to be complete and comprehensive. It is rich with all such rules and principles that may be of use to the fulfillment of human needs both in the near and remote future.

(b) Sublimity

The principles of Islamic Shariah always remain at a higher level than social standards. Whatever the degree to which the standards of human life may rise, the Shariah contains such principles and doctrines that will maintain its superiority over them and its standard will always be loftier than human standards.

(c) Permanence

The Islamic Shariah is immutable and everlasting and is characterized by permanence. Time does not affect its invariable provisions and yet it is suited to the conditions of all ages.

The fundamental characteristics of the Shariah mentioned above, notwithstanding their plurality and diversity, have emanated from one and the same source, and that is divine revelation. Had the Shariah not been revealed by Allah, it would never have possessed the qualities of perfection, sublimity and permanence, for they have been created by the Maker of the Universe. As opposed to the divine creation, man's work is devoid of these qualities.

(20) The Proof of Above Qualities in Shariah.

We have shown that the qualities which distinguish Shariah from other laws are perfection, sublimity and permanence. We shall now try to prove that it fully contains these qualities. The

readers will learn in the sequel that these distinguishing marks are to be found in each and every principle, doctrine and provision of the Islamic Shariah. We will also acquaint our readers with such principles and doctrines that have only recently found their way into the Shariah modern law and also those that are unknown to it. We will show that the Islamic law, on the other hand, is replete with them. The readers will notice that the above qualities of the Shariah characterize each and every doctrine that we discuss in this book. When it is unquestionably established that the said qualities are to be found in the contents of the Shariah, no logical argumentation is needed.

(21) The Doctrine of Equality.

The Islamic Shariah contained, at the time of revelation, explicit injunctions that declared the principle of equality as mandatory. The mandate is, for instance, expressed in the following verse of the Holy Quran

> "O mankind ! Lo ! We have created you male and female and have made you nations and tribes that you may know one another. Lo! Allah is Knower, Aware."

The Holy Prophet (S.A.W.) says the same thing in the following words:—

> "All men are equal like the teeth of a comb. The Arab is not superior to the Non-Arab except in righteousness." He enjoins the same thing in another Tradition "Allah has eradicated through Islam the arrogance of the days of ignorance and has put an end to their (the Quraish's) custom of taking pride in their ancestry:for all human beings are the descendents of Adam and Adam came into being from dust. Only the righteous person is superior among human beings."

Notice that the kind of equality enjoined by the above injunctions is unconditional and unqualified equality that admits of no justification to discriminate in favour of one individual against another individual, one group against another group, one sex against another sex, one race or colour against another race or colour, a chieftain against a commoner and the ruler against the ruled.

The Quran tells us that the descent of all men is traceable to a single source and that they are born of one male and one female. If all men have descended from the same parents, the question of discriminating between man and man does not arise at all.

The Holy Prophet's Tradition makes it clear that the existence of all men is to be attributed to one person and that they have sprung from dust. Hence all men are equal like the teeth of a comb. As no one tooth stands above the other teeth, so also no man is born higher than others.

The holy Prophet (S.A.W.) to whom the doctrine of equality was revealed lived among a people whose way of life and pattern of society was rooted in the concept of social disparities. They boasted of their wealth and material possessions, of their patriarchal and matriarchal descent, of their sex and tribes. It cannot, therefore, be maintained that the pattern of collective life and social?.. of the time necessitated the emergence of the doctrine of equality. This doctrine actually came into existence at that stage in order to raise the standard of society and set it on the path of progress. Its real purpose, however, was to enrich the Shariah with the requisite principles and doctrines of perfection so that it may be thorough and comprehensive for all times. The fact that the text of the above injunctions possesses the qualities of generality and flexibility cannot be called in question in any circumstances. Whatever the change that may come about in time, space and people's circumstances, these injunctions will never be wanting in a solution to any problem caused by the changed conditions. The provisions of Islamic law have been devised in consideration of the permanent character of the Shariah that does not admit of any modification or amendment. Its provisions have, therefore, been made so flexible that the need for any change or modification does not arise at all.

The doctrine of equality which Islam presented thirteen hundred years ago was accessible to the modern law only as late as the closing years of the 18th and the beginning of the 19th century. In other words the Islamic Shariah preceded the modern law by eleven centuries. The latter, obviously, has by its re-affirmation of the doctrine of equality, not discovered or devised

any new principle. It has actually followed and benefitted from the Islamic Shariah. The readers will notice in the sequel that the modern law provides for a very limited scope of the application of the said doctrine where-as according to Shariah there is no limit to its application.[1]

(22) Equality between Man and Woman

This, as a matter of fact, is a corollary from or an applied case of the doctrine of equality. We have however preferred to discuss it under a separate section partly because of its special significance and partly because it is indicative of sublimity and correctness of Shariah as well as of its wisdom of determining rights and duties of men and women. The Shariah does not assign to men and women their respective rights and duties in a mechanical fashion, but applies the principle of assignment in such a way that all its advantages are ensured while all the disadvantages are guarded against.

One of the general principles of Islamic Shariah is that the rights and duties of women are equal to those of men. Hence the rights and duties of men and women are identical. Women have been assigned certain duties towards men as against the duties of men towards women. Thus just as men have certain obligations to fulfil in respect of women, so also have the latter certain obligations towards men. This is explicitly stated in the following words of Allah.

> "And they (women) have rights similar to those (of men) over them in kindness" (2:228)

Having laid down this general principle of equality between man and woman, the Shariah allows, men a degree of superiority over women. "And men are a degree above them (women)".

The Holy Quran has, at the same time, delimited the extent of man's superiority:

> "Men are in charge of women because Allah has made one of them to excel the other and because they spend of property (for the support of women).

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1. We have dwelt at length on the doctrine of equality in our chapter "*on the application of law to personal cases*." Here it has just been touched upon as the main subject under discussion at present is the principles and doctrines that constitute the distinguishing characteristic of Islamic Law.

In short, man's status, as determined by Islam, is one of ruler and superior in common matters. Doubtless, it is man according to Shariah, who is responsible for bearing the expenses of women and providing proper training and education to children. Obviously the person charged with these primary responsibilities in the family must have the status of ruler and whose word, in the family matters, must be treated as final.

The power conferred on man is commensurate with his responsibilities so that he might be able to discharge them in a better way. This is the applied aspect of a general principle of Shariah according to which power is proportional to responsibilities. In accordance with this principle the Shariah determines the relationship between the persons wielding power and other people and has also laid down the limits of their power and responsibility. They are clearly presented in the following Tradition of the Holy Prophet (S.A.W.).

> "Everyone of you is the chief who shall be accountable for his charge. The priest is the chief responsible for those in his charge. Man is the guardian of his family and shall have to account for his charge. Similarly the woman is the supervisor of her husband's house and shall be responsible for her charge."

Although man has an edge over woman in common matters, yet man has no power to interfere and dictate in the affairs that are closely preserved for the woman. In fact the woman can exercise her exclusive rights as she likes and turn them to account at will without interference of man whether he be her husband or father.

The principle of equality between man and woman was laid down by Shariah thirteen hundred years ago at a time when the world was not prepared for treating man and woman on equal footing in respect of rights and duties. Hence it will be wrong to say that this equality was necessitated by the social needs of the time. The real motive behind it was the necessity to make the Shariah perfect enriching it with all those principles and doctrines that were essential for its comprehensiveness.

The sublimity of Islamic law as evident from its provision for equality between man and woman can best be judged by the

fact that this principle of equality was recognised by the modern laws as late as the 19th century. Some of these laws do not, even to this day, allow the woman to act independently in the exclusive realm of her own affairs without consulting her husband.

It is easy to evaluate the injunctions of the Quran and Sunnah under discussion because of their generality and flexibility. They are not wanting in any conceivable case of application and are capable of solving all possible problems. Again, they are characterised by sublimity and perfection to such a degree that we shall be justified in maintaining that the provision of Islamic Shariah is not amenable to change and modification, simply because they need no change and modification.

(23) Doctrine of Liberty

One of the fundamental principles of the Shariah is the doctrine of liberty. The Shariah has affirmed liberty in its best forms, guaranteeing the freedom of thought, belief and expression. Let us discuss these freedoms one by one.

(24) Freedom of Thought

By affirming the freedom of thought the Shariah has delivered man from the shackles of superstitions, myths, traditions and habits. It enjoins that man should give up everything that does not appeal to reason. It tells us that it is absolutely essential to give a careful thought to everything, judge all things by the standard of reason and accept only what reason acknowledges and reject all that it disapproves. The Shariah does not allow us to accept or say anything without thinking over it.

The very message of Islam is grounded in reason. In its affirmation of the existence of Allah, in its call to Islam and insistence on belief in the Prophet and the Holy Book, the Quran in the main, concentrates on teaching the people to think and contemplate and on trying to awaken their reason, and adopt all possible methods for persuading them to reflect over the creation of the heavens and earth as well as their own creation and over the existence of all created things and all the sensible phenomena so that they may know Allah and be able to distinguish between good and evil.

There are innumerable verses in the Holy Quran in which the principle of freedom of thought has been expounded and the use of reason emphasized. The following verses may be cited in this connection:—

"Lo! in the creation of the heavens and the earth, and the difference of night and day, and the ships which run upon the sea with that which is of use of men and the water which Allah sendeth down from the sky, thereby reviving the earth after its death, and dispensing all kinds of beasts therein and (in) the ordinance of the winds, and the clouds obedient between heaven and earth are signs (of Allah's sovereignty) for people who have sense". (2:164)

"Say (unto them, O Muhammad):I exhort you unto one thing only:that ye awake, for Allah's sake, by Twos and singly, and then reflect." (34:46)

"Have they not pondered upon themselves? Allah created not the heavens and earth, and that which is between them, save with truth and for a destined end." (30:8)

"Say:Behold what is in the heavens and the earth!" (10:102)

"So let man consider from what he is created. He is created from a gushing fluid. That issues from the loins and ribs." (84:5-7)

"Will they not regard the camels how they are created? And the haven, how it is raised? And the hills, how they are set up? And the earth, how it is spread?" (88:17-20)

"Lo! therein verily is a reminder for him who hath a heart, or giveth ear with full intelligence." (50:37)

"But only men of understanding really heed." (3:7)

The Quran warns the people against suspension of their faculty of reason, keeping it indolent and following others blind-fold; against superstitions and belief in myths, and against indeliberate adherence to traditions and customs. If they behave in this manner, they will hardly be different from or become even worse than animals, for they would then be following others without deliberation and without allowing their reason to sit in judgement at their words and deeds. Reason is the only faculty

bestowed by Allah on man that marks him off from animals. If he allows this faculty to remain inert and gives up thinking, he will become an animal or even worse.

"And when it is said unto them. Follow that which Allah has revealed they say:We follow that wherein we found our fore fathers. What! Even though their fore fathers were wholly unintelligent and had no guidance ? The likeness of those who believe (in relation to the messenger) is as the likeness of those who calleth until that which heareth naught except a shout and cry. Deaf dumb, blind, therefore they have no sense." (2:170-171)

"Have they not travelled in the land, and have they hearts wherewith to feel and ears wherewith to hear? For indeed it is not the eyes that grow blind, but it is the hearts, which are within the bosoms, that grow blind." (22:47)

"Already have we urged into hell many of the *jinn* and humankind, having hearts wherewith they understand not, and having eyes wherewith they see not, and having ears wherewith they hear not. These are the beast-nay, but they are worse! They are the neglectful."

Man may think of anything and may adopt any mode of thinking he chooses. He cannot be censured for his thought, even if he thinks of those acts prohibited by the Shariah; for the Shariah does not censure the mind and does not call anyone to account for thinking of any unlawful word or deed. A person is taken to account only when an unlawful word has been said or an unlawful act has been committed by him. The Prophet (S.A.W.) says the same thing in the following words:—

"Allah has forgiven my Ummah for any idea that may come into its mind so long as it does not act upon such an idea or utters it."

(25) Freedom of Belief

The Islamic Shariah is the first law in the history of the world to guarantee the freedom of belief. It does not only guarantee this freedom but also goes further to protect and lend it maximum support. According to Shariah every individual is at liberty to hold any belief or religious opinion he chooses and nobody is

allowed to compel him to renounce his belief, religious opinion, accept some other belief or prohibit him to express his religious opinion.

But the Shariah is a practical law. It does not stop at merely declaring the freedom of belief. It clearly lays down the procedure to protect it. This consist of two methods

(i) It is incumbent upon every individual to respect another individual's right to belief as well as action thereon. No person can coerce another person into accepting any particular faith or renouncing his or her faith. If his belief is' at variance with that of the latter, he should try to convince him by persuasion, making him realise the error involved in his belief. If he is convinced and willingly renounces his belief, well and good. But if he does not acknowledge the error, it is not permissible to coerce him, nor is it in any way justified to exercise one's influence so as to force him to give up his religion. It is enough for discharging one's duty to explain the error inherent in the belief of a person professing a different religion. Having this done, one has shown him the right way and guided him to the right path. One can find injunctions to this effect in the Holy Quran

"There is no compulsion in religion". (2:256)

"And if thy Lord willed, all who are on the earth would have believed together. Wouldst thou (Muhammad) compel men, until they are believers?" (10:100)

"Remind them, for thou art but a remembrance' Thou art not at all ward over them" (89:21-22)

"But the messenger has no other charge than to convey the message plainly." (24:54)

(2) It has been enjoined upon the believer himself that he should guard his faith and strive to champion it. He should refrain from adopting a negative attitude in this respect. If he finds that he is no longer able to defend and champion his faith, he should migrate from the place where his faith is not respected to a place where it is respected and where he is allowed the opportunity to profess it above board. If a believer has the strength to migrate but he does not do so, he is doing a wrong to himself even before he is oppressed by the person with a different belief. Such a believer is also guilty of a great sin, for which he deserves

to be punished. But Allah does not overburden a man who does not have the strength to migrate. The following verses of the Holy Quran elucidates this point

> "Lo as for those whom the angels take (in death) while they wrong themselves, (the angels) will ask :In what were ye engaged? They will say:we were oppressed in the land (The angles) will say: Was not Allah's earth spacious that they could have migrated therein ? As for such, their habitation will be hell, an evil journey's end".
>
> Except the feeble among men, and the women, and the children, who are unable to devise a plan and are not shown a way.
>
> As for such, it may be that Allah will pardon them. Allah is ever clement, for giving. (IV:97-99)

By guaranteeing the freedom of belief to all the people including the Muslims and the non-Muslims the Shariah has exhibited the highest degree of sublimity. It has given the non Muslim citizens of an Islamic state the right to profess lather, religion and express their belief, openly perform their religious rites, keep their places of worship occupied and set up schools for teaching their religion. Take for example, the Jews. They were allowed by the Islamic states complete freedom to their synagogues and to worship according to their custom. They also had their schools in which the religion of Moses was freely taught. Again they were at liberty to write about their religion and try to prove its superiority over other Systems of belief by comparing it with the latter within the limits of propriety and morality and without prejudice to the peace and tranquillity of the State. The Christian scholars representing various schools of thought were also allowed similar freedom. Every Christian sect had its churches and, schools in the Islamic State where its members freely worshipped and taught creed freely. Besides, they wrote and published books on their religion without any interference.

(26) Freedom of Speech

The Islamic Shariah does not merely provide for freedom of expression. It recognizes this freedom as the right of every individual. It goes even a step further and declares the freedom

of speech as an obligation with respect to morality, common weal, institutional matters and prevention of evils.

Allah says in the Holy Quran:—

> "And there may spring from you a nation who invite to goodness and enjoin right conduct and forbid indecency." (3:104)
>
> Those who, if we give them power in the land, establish and enjoin kindness and forbid inequity." (22:41)

The Holy Prophet has taught the same thing in the following traditions:—

> "If any one of you sees an evil, he should rub it out with his own hands. If he does not have the strength to do this, he should verbally denounce it. But if he is unable to do even this much, then he should deem it vicious at heart and this is the nadir of the weakness of one's faith."

Again,

> "To speak the truth in the face of a tyrant is the best form of Jihad (Crusade).
>
> There is yet another tradition of the Holy Prophet which runs as follows:—
>
> "Faith consists in exhortation and goodwill."
>
> "O Prophet of Allah," asked his companions, "for whom do you mean?"
>
> The Prophet replied, "For Allah, for His Prophet, for His book, for the leaders of Muslims as well as the Muslim people in general."
>
> The Prophet has said in another Tradition, "Hamza bin Abdul Muttalib is the leader of martyrs. He was the man who enjoined upon a tyrant to do good and forbade him to do evil. He was punished with death for committing this crime."

Although every individual has the right to speak or use his pen in defence of his faith, but this right does not constitute unqualified freedom. One can exercise this right only within the limits of social decorum and morality and on condition that it is not repugnant to the injunctions of Shariah.

The Islamic Shariah affirmed the freedom of speech and writing right at the time of its revelation, imposing simultaneously such restrictions on the exercise of this right as guarantee safeguards

against encroachment on these rights or against the abuse of the freedom of speech. The Prophet of Islam was the first to have announced this freedom and to have called the people to make use of it. But he was at the same time the first person on whose freedom of expression restrictions were imposed. It was necessary to restrict his freedom because his word and deed were to serve as a model for humanity. It was also necessary to make the people realize that the prophet himself, not to speak of ordinary men, did not enjoy unrestricted freedom of expression notwithstanding the fact that Allah says of him:

> "And most surely you conform (yourself) to sublime morality". (68:4)

Allah commanded the Holy Prophet (S.A.W.) to convey his message to the people, persuade them to believe in his prophethood and, by disputation, try to goad the disbelievers reason and awaken their hearts. Nevertheless, the Prophet was not allowed unqualified freedom of expression. On the contrary a procedure was laid down for him for inviting the people to the path of Allah and for disputation with the disbelievers. It was made incumbent upon him to carry out his mission judiciously with good counsel, converse with them in the best possible manner to shun stupid people, refrain from saying anything indecent and from reproaching the people worshipping false gods. These were the restrictions imposed by Allah upon the Holy Prophet's freedom of speech. It was made clear to him that this freedom was not absolute. The condition under which such freedom is provided for in the Shariah is that it should not be misused or should not be used in a manner which may offend others.

These restrictions imposed on the freedom of expression benefits all the individuals and nations, pave the way for progress and generate the feelings of fraternity and love. It also engenders and fosters the atmosphere of confidence among individuals and institutions, brings about a consensus on truth among the leaders, inducing them to cooperate with one another. Consequently personal and factional slogans are done away with. This is the kind of atmosphere lacking in modern age and the world is striving in vain to find ways and means to create it.

The comprehensive character of the principle of Shariah

pertaining to the freedom of expression may well be judged from the fact that modern legal experts are divided into two groups in spite of their long experience. One of these groups favours unqualified freedom of expression with a few restrictions in the field of general administration only. But it attaches no importance to morality. This begets only hatred, animosity and factionalism leading to social disorder and anarchy. The other group favours imposition of restrictions on any opinion that is at variance with the position held by those in power. If this idea is put into practice, it will repress freedom of thought and expression and virtuous people would be kept away from governmental affairs. This would give rise to dictatorship, social unrest and revolutions.

The Islamic Shariah is opposed to the concepts of both licence and a complete denial of liberties which are dominant in modern states. Islam basically advocates freedom of expression. But it imposes at the same time certain restrictions thereon in order to safeguard morality, social propriety and smooth running of general administration; for, without these restrictions, freedom of expression cannot produce the desired results. The individual enjoying this freedom can be prevented from giving offence to others only when they are restrained from saying anything that may prejudice morality, social decorum and maintenance of law and order. Obviously nobody can have a right to transgression and offence, the denial of which might be tantamount to depriving him of something he is entitled to.

Doubtless, the Islamic Shariah allows every citizen to say anything without transgressing the prescribed limits; that is, a citizen should abstain from vituperation, defamation, calumniation and from telling lies. He should rather try to rally the people round himself with prudence and good counsels. He should talk to them politely, refrain from uttering anything evil and avoid stupid persons. The people will naturally lend ear to what a person adhering to the above principles has to say and attach due importance to it. Another advantage of the restrictions on the freedom of expression is that the person observing them will have good relations with other people and the community, as a whole, will be able to carry on the task of promoting common welfare effectively.

The following verses of the Holy Quran constitute the charter of the freedom of expression.

"Call unto the way of thy lord with wisdom and fair exhortation and reason with them in the better way" (16:125)

"Keep to forgiveness (0 Muhammad) and enjoin kindness, and turn away from the ignorant." (8:199)

"When the foolish one's address them (they) answer peace." (25:63)

"Revile not those unto whom they pray beside Allah lest they wrongfully revile Allah through ignorance."(6:109)

"Allah loveth not the utterance of harsh speech save by one who hath been wronged." (4:148)

"And argue not with the people of the scripture unless it be in (a way) that is better, save with such of them as do wrong". (29:46)

There were the three aspects of the freedom of expression which the Islamic Shariah presented at a time when the people's mental horizon was limited by traditions and they could not think beyond their ancestors' practice. They naturally resented any change in their beliefs on account of their outlook on life. Only the powerful people and those in authority among them enjoyed freedom of expression and thought. That was why the Muslims of the earliest period had to face great difficulties and persecuted in their missionary work. They were brutally tortured for changing their belief and were compelled by every possible means to abandon their new faith. The heathens lost no opportunity to perpetuate atrocities on the Muslims. Whenever the Muslims spoke to propagate their faith, they were silenced and no sooner they stood up to offer their prayers than their watchdogs busied themselves to torture them.

From what has been stated above, it will be seen that expounding the principle of freedom of expression did not keep abreast with the process of social evolution as it did not care to fulfil the needs of the society at that stage of development, for this principle was not acceptable to the world then. The Shariah provided for this freedom so that the society might be set on the path of progress, the people lifted from the abyss of ignorance

and depravity and above all, the Shariah itself might attain to perfection and become in-variable and perpetually applicable.

The provisions of Shariah with respect to individual liberty and limitations thereof are so flexible and comprehensive that they need no change or modification, for the Shariah in itself does not admit of any amendment. All its injunctions are general and flexible enough to withstand the test of time in all circumstances.

The Islamic Shariah affirmed the doctrine of individual liberty eleven centuries before the modern law; for it was introduced into the latter as late as at the end of the eighteenth and beginning of the nineteenth centuries. Before that the concept of liberty was unknown to the man-made law. The thinkers and reformers in the west and those who ventured to criticise the official religion were severely punished. This is a historical fact. Viewed in the light of history, the claim that Europe was the first to champion individual freedom, would turn out to be utter falsehood. This utterly false claim is based on the ignorance of Shariah which may be condoned in the vase of westerners. But how can we escape the charge of subscribing to it?

(27) The Doctrine of Consultation

The principle of consultation as provided for in the Shariah has been laid down in the following verses of the Holy Quran

"(And those) whose affairs are a matter of counsel." (42:38)

"And consult with them upon the conduct of affairs" (3:159)

The assertion of the principle of consultation was not a reaction to the conditions prevailing in the society, since Arabs were overwhelmed by pagan ignorance and fallen to the lowest degree of backwardness. The Islamic Shariah was the first to provide for the doctrine of consultation as it was essential for a law to be perfect, permanent and invariable Again, provision for such a doctrine was necessary as it was conducive to social progress, demanded careful consideration of general problems, accustomed the people to attach due importance to their problems and taught them to keep in view the future of the Ummah, to ensure the

people's participation in the affairs of the government and to have an eye on their rulers and their conduct. In short, the doctrine of consultation is essential for the perfection of the Shariah itself as well as for the guidance of the society and raising the social standard.

The two verses of the Holy Quran quoted above in the context of the principle of consultation are characterized by generality and flexibility to such a degree that it will never be amenable to modification. This explains our earlier observation that the Islamic Shariah is everlasting, immutable and does not admit of amendment.

It is for this reason that having laid down the general principle of consultation, the Shariah has not left the framing of the rules of its execution to the discretion of the people in power; for such rules must, of necessity, vary with places, societies and time. The people holding the reins of government may ascertain the will of the people through the elders of tribes and heads of families, or find out by a direct or indirect vote the opinion of individuals fulfilling certain conditions laid down for the purpose; or they can adopt any other method to ascertain the people's mandate, which they may deem fit and which does not prejudice the interests of any individual or pose a threat to the interests of individuals or community as a whole or to the smooth running of general administration.

However, the Shariah has prescribed certain basic rules for the enforcement and application of the doctrine of consultation, instead of leaving them to the discretion of the rulers. These basic rules, like the fundamental doctrine do not admit of modification or change because they have been clarified in the relevant injunctions of the Quran and the traditions of Holy Prophet (S.A.W.). The general principle is that any rules explained in such injunctions need no modification. One of the basic rules pertaining to the enforcement and application of the concept of consultation and declared as binding by the Shariah is that the minority whose opinion has not been accepted should take the initiative in the enforcement of majority's mandate and treating it as binding should carry it out in all sincerity and defend it in the same spirit as the majority itself would do. Besides once an

issue has been thoroughly considered and discussed, the minority, according to general principle referred to above, has no right to criticise the decision made by the majority or to call it into question at the time of its enforcement. This was the practice of the Holy Prophet (S.A.W.) and ought to be followed by all Muslims in compliance with Allah's command

> "And whatsoever the messenger giveth you, take it, And whatsoever he forbiddeth, abstain (from it)."

The Holy Prophet himself gave the lead in translating the above basic rule into action and his practice was subsequently followed by his companions.

On the occasion of the Battle of Uhud, the Holy Prophet (S.A.W.) came to know that the forces of Quraish had already reached Madina and encamped on the side of the Mount Uhud near the town. The Prophet called a meeting of his companions to decide whether the Muslims should move out of the town to meet the enemy or fortify themselves within the town itself. The Prophet himself was of the opinion that they should preferably take up their positions inside the town and the disbelievers should be attacked at the approaches to the town, should they try to penetrate into it, while the womenfolk should fight from the top of their roofs. Some of his companions as well as Abdullah bin Ubaiy concurred with the Prophet. But a majority of his companions preferred to give a battle to the enemy outside the town. On this occasion the Prophet was the first to enforce the decision of the majority. The Apostle of Allah left the meeting, went home and returned with his arms ready to fight. He then led both the majority and minority parties out of the town to meet the enemy. Thus he put into effect the decision of the majority, notwithstanding his own opinion was to the contrary. But subsequent developments proved that his own opinion was right and must have been translated into action.

This practice of the Prophet (S.A.W.) was followed by his companions in the battle against the apostates. A majority of the companions expressed the view that peace was preferable to war against the apostates. But the first Caliph Hazrat Abu Bakr (R.A.A.) together with a few Companions of the Prophet were in favour of war and adopting a hard line against them. However when the

issue was discussed, most of the companions were satisfied with the caliph's verdict and thus he had the support of the majority in the final analysis. When Hazrat Abu Bakr decided to give effect to his verdict, the very people who were opposed to it, were the first to offer their lives and property to get it enforced.

This sacred practice, which is a complement of the principle of consultation is only effective remedy for the failure of modern democracy. It has been widely acknowledged that the democratic. States have utterly failed in the enforcement of the principle of consultation. The basic cause of their failure is that the individuals in these States are allowed the right to keep on criticising a decision of the majority after the conclusion of the critical phase and go on calling it into question during the phase of its implementation, belittling its importance thereby. In fact, they enjoy the right of criticism even after the enforcement of a mandate, presenting it as something ridiculous.

Under a democratic constitution the functions of government are entrusted to the majority party; but its decisions and measures are always subjected to criticism and decision. It is generally alleged that the views of Majority are untenable and worthless and are therefore, not duly respected. The party in minority goes to the extent of evading the law enforced by the majority party. This state of affairs continues until the ruling party is reduced to minority and the party in minority swells into majority and finally accedes to power. Now the views and actions of this party are opposed in the same way as those of the previous ruling party. In short the decisions and views of a party in power is constantly subjected to criticism, decision and question.

Criticism is, no doubt, the best means of improvement in democratic process, but does good only at the deliberative stage and prior to the implementation of the majority's decision. But when the decision once enters the stage of implementation or execution, its criticism will cause only dissension. In fact criticism at this stage would be incompatible with the basic tenet of the doctrine of consultation, under which the masses are to be governed in accordance with the verdict of majority. In other words the consensus of the majority should be respected and treated as binding on all the individuals.

As a logical and natural result of the critical attitude of the minority towards the majority is that the people in power in the democratic countries are driven into a corner so much so that they are incapable of doing anything properly. The people consequently lose confidence in their leaders and parties. They are no longer confident that leaders are capable of leading the people and looking after them in a better way. This is but quite natural, inasmuch as the men elected by them pay little heed to what they have to say.

Although the people's loss of confidence in the leadership is the main cause of failure on the part of democratic states in the application of the principles of consultation, yet in view of the fact that this failure is a universal phenomenon manifest in all the democratic countries, the people have come to believe that the very principle of consultation is totally impracticable. In other words, loss of confidence in the people responsible for the enforcement of the principle is transferred to the principle itself. Consequently, countries having democracy abandoned democratic system and sought to atone for its failure in dictatorship.

But the experience of dictatorship has shown that this system has received even more setback than democracy; for in the dictatorial system, people are deprived of the freedom of speech and thought and the right to have a government of their choice; the government loses contact with the masses and both the government and the people are confronted with inconceivable difficulties and intricate problems, and the entire nation has to bear the brunt of the consequences of dictatorship in the final analysis. When dictatorship replaces democracy it appears to be successful. But the credit of its success does not go to the dictatorial system itself. Its real cause is that the people fed up with democracy repose their confidence in dictators and demonstrate their support for them. The dictators too, on their part, want to do something for the benefit of the people. But when these trustworthy fellows are replaced or fail to achieve the objectives of their programmes, their relation with the people is at once cut off. This state of affairs results in the deterioration of the dictatorial system which is indicative of a change of government in the offing. However,

the actual change comes about when the hold of the rulers on administration is weakened or the people get the better of them and have the courage to en-counter them defiantly.

We are now in a position to assert without any hesitation that the Islamic system is not only an effective remedy for the failure of democracy but is also a strong citadel which protects a nation from the transgressions of dictatorship; for Islam does not only safeguards the philosophy of consultation but also translates it into action. Moreover it mobilizes all the energies to promote social welfare, rekindles confidence in the principles of consultation and holds in check the emergence of any extremist doctrine or dictatorial system.

The real basis of democracy is consultation and cooperation. But owing to the misapplication of the principle of consultation in it the governors are swayed by the governed and there is complete lack of co-operation between the two classes. Dictatorship, on the other hand, rests on obedience and an atmosphere of mutual confidence between governors and the governed. But owing to the abuse of dictatorial system the governed are completely subdued by the governors and they distrust each other. The essence of Islamic system, as opposed to both democracy and dictatorship, is consultation when it is needed and cooperation and obedience when the verdict of majority is being enforced. Besides, the rules of Islam do not admit of the domination of the rulers by the ruled or the other way round. Thus the Islamic Order is absolutely free from the vices of dictatorship and abounds in all the virtues of both taken together.

The Islamic Shariah, by virtue of its provision relating to consultation, has been eleven centuries ahead of the modern law in which this principle was incorporated only in the wake of French Revolution. England, of course, is an exception, where it was introduced in the seventeenth century. And in the U.S.A. the principle of consultation was provided for as late as the later half of the eighteenth century. Subsequently, the principle of consultation was universally acknowledged and in the following century, most of the laws of the western world comprehended it. At any rate, it is evident that by reaffirming the principle of consultation, modern law has not presented any new doctrine, but has accepted

what Islam had already expounded. It is Treading the path laid down by Islamic Shariah in the seventh century.

(28) The Concept of Limitation of Authority

The Islamic Shariah was the first to impose limitations on authority and to restrict the exercise of power by the people in authority. It makes them accountable for their faults and transgressions.

This concept of the limitation of authority is grounded in the following principles:

1) Limitation on Authority.
2) Accountability of people in power for their faults and transgressions.
3) The right of community to remove any person in Authority.

Principle No.1:Limitations of Ruler's Powers

Before the advent of Islam the people in authority enjoyed absolute and unlimited power. The relationship between the ruler and the ruled was based on might and strength. The degree and extent of power which the former enjoyed was proportional to his might. As he grew weaker his power correspondingly diminished and deteriorated. The people did not obey the ruler in his capacity as their ruler but because he was mightier and more powerful. Hence as long as the ruler could drive the people with his scepter and kept them subdued with his impressive personality and wealth, the people remained obedient to him. But when he grew weaker or a stronger rival overcame him, the people naturally became his subjects. In those days common people were regarded as thralls and servants of the man wielding power, regardless of the fact whether he inherited it or seized it by force.

When a ruler came to power by dint of force and strength, his authority was absolute and unrivalled. He had the licence to do anything with impunity.

The Islamic Shariah replaced all such antiquated values by those that behaved human dignity and fulfilled collective needs. Islam re-established the relationship between the rulers and the ruled on the basis of collective interest, bestowed on the society

the right to appoint such rulers as could work to safeguard, and to promote its interest. It also imposed limitations on authority, and made it obligatory for the rulers to abide by them. In case any ruler violated these limitations, the community had the right to remove him and elect in his place another person, capable of running its affairs and look after its interests.

The Islamic Shariah has laid down both the rights and obligations of the ruler in detail. According to the Shariah the main responsibility of the ruler is to guard the faith of Allah, and act as vicegerent of His apostle in political affairs. The jurist use the term Imam for the ruler.

According to the jurists of Islam the Office of an Imam or Caliph consists in a contract concluded by mutual consent and free choice.[1] According to this contract the Imam is duty bound[2] to look after all the internal and external affairs of the Ummah or the community in order to safeguard its interests and all his functions, in this respect, must be performed within the limits, prescribed by Allah and His Apostle. As against the duty assigned to the Imam, the Ummah is charged with the responsibility to obey and follow him as long as he adheres to the limits laid down by Allah. If the Imam deteriorates morally, or is no longer capable of discharging his duty directly, he shall be removed.

To sum up, the Imam in Islam does not enjoy unlimited powers and does not have the licence to commit or omit whatever he likes. He is an individual of the community chosen to lead it. The community imposes certain obligations, and confers certain rights on him. He enjoys powers only accordingly as he fulfils his obligations and exercises his rights. It is incumbent on him not to overstep the limits prescribed by Allah and the Holy Prophet and do anything repugnant to the spirit of the Shariah, as is enjoined by the Quran:

(1) *Al Ahkam-ul Sultania*, p6,

(2) The Author of *Al Ahkam-ul-Sultania* has adumbrated the functions of the *Imam* as follows:—

(a) Protection of Faith (b) Creation of Peaceful conditions (c) Establishment of order (d) Enforcement of punishments (e) Execution of injunctions (f) Defence of Promoters (g) Jihad (h) Collection of taxes (i) Looking after people's property in the event of disturbances (j) Supervision of Officers charged with these duties.

"So judge between them by that which Allah has revealed." (5:49)

"And we have set the "(O Muhammad) on a clear road of (Our) commandment; so follow it; and follow not the whims of those who know not." (45:18)

"Whoso judgeth not by that which Allah hath revealed; such are disbelievers" (5:44)

By making the injunctions of the Shariah binding on the Imam it is meant that his powers have been restricted to the bounds of the Shariah that his power operates within the jurisdiction delimited by the Shariah and is ineffective beyond that jurisdiction and that what is lawful for the community is also lawful for the Imam and whatever other individuals are denied the Imam is also forbidden.

Principle No.2:Concept of Ruler's

Accountability for His Transgressions and faults.

Having outlined the duties and responsibilities of the Imam and delimited the extent of his powers, the Shariah proceeds to make him accountable for aught he does beyond his jurisdiction whether he does it intentionally or negligently. The Islamic concept of the ruler's responsibility is a logical and natural result of his position determined by the Islamic Law. The Shariah as we have seen, has laid down the rights and obligation of the ruler and made it incumbent upon him to refrain from overstepping his lawful limits. It does not allow him any special privilege but treats him at par with an ordinary citizen of the State. Hence justice and equality demands that the ruler should be called to account for anything he does in violation of the Shariah just as every citizen has to account for an unlawful act, whether done intentionally or negligently. When we take up the point that the provisions of Shariah are applicable to all alike, we will dwell at length on the question of the accountability of the rulers. Here it has been simply touched upon to explain the distinguishing characteristics of the Islamic Law and to show that the principles of Shariah are superior to those of modern law.

Principle No.3: The People's Right to remove the ruler.

As has already been stated, the office of the Imam rests on a contract under which the masses choose their leader. The ruler on his part, keeps an eye on their affairs and problems and leads them in a manner determined by the Shariah. The conclusion of this logic that ruler who performs his functions within the limits laid down for him is to be obeyed and one who does not discharge his responsibilities or respect the said limits, the masses are not bound to follow and obey him; such a ruler is advised to quit his office at once and make room for one who is fully capable of enforcing the divine laws. If he does not quit of his own accord, the nation should overthrow him and choose some suitable person in his place. The same logical conclusion also constitutes a Quranic injunction which the Holy Prophet (S.A.W.) acted upon, and his caliphs followed suit subsequently. Allah enjoins upon the Muslims to obey the people in authority within the limits prescribed by the Holy Prophet (S.A.W.)

> "O ye who believe! Obey Allah and obey the Messenger and those of you who are in authority; and if you have a dispute concerning any matter, refer it to Allah and the messenger if ye are (in truth) believers in Allah and the Last Day. That is better and more seemly in the end." (4:59)

The Holy Prophet, however, says:—

"If any act is tantamount to the defiance of Allah's command, no created being can be obeyed in doing it."

According to another tradition the Prophet said:—

"Obedience is enjoined only in what is good."

Another saying of the Prophet regarding obedience to people in authority is as follows:—

> "Whoever amongst them commands to do something sinful, his mandate is not binding."

After the demise of the Prophet, Hazrat Abu Bakr was appointed the caliph by the Muslims. In the very first speech he delivered in this capacity, he elucidated the above injunctions in a subtle manner. He declared :

> "O people! I have been appointed your governor, but I am no better than you. I do aught good, help me and if I go wrong, set me right.
>
> As long as I obey Allah and His Apostle, obey, me, but when I defy their injunctions, my command will not be binding on you."

When Hazrat Umar succeeded Hazrat Abu Baker, he wanted to impress the above injunctions upon the minds of the peoples. So he said:—

> "I want that the people should choose a chief even if you and I are committed to the stormy waves of the ocean in a boat and the boat is being tossed by the waves hither and thither. If the chief chosen by you treads on the right path, follow him; but if he goes astray, they should execute him."

Hazrat Talha (who was present) objected. "Why not say that if he takes the wrong path, the people should remove him." "No", retorted Hazrat Umar, "execution will serve as a better example for his successors."

This doctrine of the limitation of authority was presented by the Shariah at a time when powers of the ruler knew no bounds. Evidently this concept did not emerge simply because it was suited to the needs of the time and the prevailing conditions. It was rather necessitated by the need to make the Shariah perfect and perpetually applicable, to raise the standard of the society and set it on the path of progress.

The injunctions pertaining to the above doctrine are comprehensive and flexible enough to be applied at all times and at all places and will never be inapplicable to any new situation.

The Shariah has been far ahead of all the modern laws in imposing limitation on authority. It was the first to provide this basis for a relationship between the ruler and the ruled and to expound the principle of the community's supremacy to the people in authority. The first modern law which acknowledged the paramount of the people over the ruling class is the law of England which absorbed it in the seventeenth century, i.e., eleven centuries after the advent of the Islamic Shariah. It was later incorporated in other laws in the wake of the French Revolution. The modern law has followed also the application of the above doctrine, declaring constitution as the line of demarcation between the

rulers and the ruled, in which the rights of the community and the rulers and the latter's jurisdiction are laid down just as the injunctions of the Quran and Sunnah which virtually comprises Islamic constitution, marks off the rulers and the ruled from each other.

(29) The Conception of Divorce

The Shariah permits man to divorce his wife, whether his marriage with her has been consummated or not and even if there is nothing to show that any harm has been done to wedlock. The husband has the right to divorce her at all events.

However, the Shariah allows woman to have recourse to a court of law to seek divorce provided that her husband is the cause of her moral deterioration and material loss or fails to fulfil his obligations towards her as provided for in the Shariah.

Man occupies a position superior to woman and plays a leading role in conjugal affairs. That makes all the difference between the rights of man and woman to divorce. It is man indeed, who has. to shoulder all the responsibilities in relation to those affairs. It is he who has to pay to woman the dowry agreed upon, to bear the charges of marriage and meet the expenses of woman from the first day of wedding, whether or not she has moved to his house. He has to bear responsibilities with regard to children. In view of all these great responsibilities man must have unconditional right to divorce. This is in the interest of woman as well; for if man is called upon to explain the causes of divorce, it may jeopardise the reputation of woman. In that case he may face difficulty in marrying again. The woman has been given the right to seek divorce in the event of any material or moral harm done to her by her husband. This conditional right of woman is not only in accord with the principle of man's superiority but also constitutes a safeguard against any possible transgression on his part. It also guarantees protection to man against any undue demand of woman seeking divorce.

In short, the Shariah acknowledges on the one hand, man's unconditional right to divorce, while providing for his obligations in respect of the woman and her interests on the other. Divorce may take place either before the consummation of marriage and

determination of dowry or after the completion of these formalities. In either case there are certain specific legal obligations for man to fulfil. These obligations are not only a sort of compensation for woman but also serve as a curb on man, making him think a hundred times before deciding to divorce.

Divorce Prior to Consummation and Determination of Dowry

If man divorces his wife before consummation of marriage and determination of dowry, he shall give her something by way of compensation according to the prevailing custom. By custom it is meant the practice prevailing among the people of husband's rank and class at a certain place. Persons of similar and equal means would serve as an example in this case. The relevant verse of the Holy Quran is as follows:—

> "It is no sin for you if ye divorce women while yet ye have not touched them, nor appointed unto them a portion provided for them, the rich according to his means and the straitened according to his means, a fair provision. (This is) a bounden duty for those who do good." (2:236)

Divorce Before Consummation and after the Determination of Dowry

If a man divorces his wife before the consummation of marriage and after the dowry is agreed upon he shall pay half the amount of dowry thus determined so that the woman might be compensated for the divorce in accordance with the Quranic injunction:—

> "If ye divorce them before ye have touched them and ye have appointed unto them a portion, then (pay them) half that while ye appointed unless they (the women) agree to forego it or he agrees to forgo it, in whose hand is the marriage tie" (i.e. bridegroom). (2:137)

Divorce after Consummation

If a man divorces his wife after consummation, he shall pay to her the amount of dowry agreed upon in full, although he may not be having the major portion of the amount at the moment.

Besides, whatever the man may have given to her at the

time of marriage as well as that which he may have given to her under legal obligation or at pleasure during the wedlock exclusively belongs to her and he shall not be entitled to claim it back. The Quranic verse to this effect is as follows:—

> "And if you wish to change one wife for another and ye have given unto one of them a sum of money (however great) take nothing from it. Would ye take it by the way of calumny and open wrong?" (4:29)

On divorcing a woman a husband is under the obligation to bear her expenses till *'iddat'* or waiting period is over, and she is in a position to take a second husband. The period of *iddat'* varies according to as she is pregnant or not in case she is pregnant the Quran fixes the waiting period as follows

> "And for those with child, their period shall be till they bring forth their burden". (45:4)

If she is not pregnant, her waiting period has been determined in the following verse:—

> "Women who are divorced shall wait, keeping themselves apart, three (monthly) courses." (2:228)

The term occurring in this verse has been interpreted differently by different scholars. According to one view it is synonymous with menstrual period, while according to another it extends to the time of her purification from menstruation.

It is quite clear from the above verses, the Quranic injunctions pertaining to divorce are comprehensive and flexible to the highest degree and are, therefore, suited to all places and all times. They are invariable and admit of no modifications. Time has proved it beyond doubt that despite the lapse of over thirteen hundred years these injunctions are as fresh, sublime and potential as they were at the time of revelation. The Islamic Shariah allowed the right of divorce to both husband and wife thirteen centuries ago, qualifying it, however, with firm, fair and equal guarantees to both the parties; whereas in the modern world it was introduced and acknowledged as late as the twentieth century. Before that the people of the West criticised the Islamic Shariah for its provision for the right to divorce. But in course of time, as the era of learning and advancement dawned and the Western nations were

set on the path of progress, the rust blighting their intellect was removed and their scholars and thinkers came to realise that the right to divorce was actually a blessing to both husband and wife and the only way out of the predicament resulting from unsuccessful conjugal union, miserable social life and psychological torment. It was now comprehensible to them that the life of both man and wife could be ameliorated and both of them could be delivered from devilish apprehensions through divorce alone.

There is no advanced nation in the present day world that does not have a law of divorce. However, modern laws of divorce vary from nation to nation. Some of them have a wider scope of application while others have only a limited scope. According to the Russian law, for instance, both man and woman enjoy the right to divorce. Thus the Soviet Union, keeping in view man's right to divorce, as provided for in the Islamic Shariah, has acknowledged it as true of both man and woman. In some of the States in USA, on the other hand, man and woman both have been allowed the right to seek divorce provided that the person seeking it proves that the other party is a cause of material loss or spiritual and moral harm to him or her as the case may be. In other words, they have borrowed from the Islamic Shariah the concept of woman's title to seek divorce and extended it to man as well. Most of the modern laws acknowledge the right to seek divorce under special circumstances within a limited sphere. In other words, these laws apply the Islamic right of woman to seek divorce to both man and woman under special circumstances and within a limited range.

To sum up, the world has accepted the Islamic concept of divorce after the lapse of thirteen hundred years. It is quite possible that before the end of the twentieth century the modern laws may be amended to provide for a wider range of application and thus absorb the Islamic concept in its entirety.

In view of what has been said above we are in a position to maintain that when the Shariah was revealed, the world was not prepared to accept its concept of divorce. The object of this provision was to make the Shariah comprehensive and inclusive of all the concepts essential for a perfect and everlasting law and

thereby raise the standard of human society and set it on the path of progress and perfection.

(30) The Concept of Prohibition

The Islamic Shariah declares the use of liquor unlawful absolutely and unconditionally and includes the punishment of its use among those huds or punitive measures from which no person or authority is empowered to exempt the offender, just as he is not competent to pardon any of those crimes for which such huds or punitive measures have been prescribed. The qazi or the judge is, therefore, not authorised to reduce the above huds or commute them into other punishments or suspend their execution. However, Islam did not declare the use of liquor unlawful at once, but did it gradually; for drinking was common among the Arabs and was the only means of revelry. Hence wisdom demanded that the punishment for it should be enforced gradually. Thus the following verse of the Holy Quran was the first to be revealed to forbid liquor

> "O ye who believe! Draw not near unto prayer when ye are drunken, till ye know that which ye utter." (4:43)

In this verse Allah forbids prayer when one is intoxicated. Since prayer has been made obligatory from 'fajr', (Prayer offered before daybreak) to Isha (night prayer) five times a day the logical result of this injunction would be to drink liquor only in such quantities as do not intoxicate the mind and one is able to offer one's prayer in a state of sobriety. That was probably the reason that the companions of the holy Prophet were constrained to enquire about the real in-junction as to liquor and it was in response to their enquiry and in order to explain the cause of prohibition that the following verse was revealed

> "They question thee about strong drink and games of chance. Say in both is great sin and (some) utility for men' but the sin of them is greater than their use fullness." (2:219)

When the people were mentally prepared to give up drinking by the gradual revelation of verse pertaining to prohibition, the final and unequivocal injunction was revealed:—

> "O ye who believe! Strong drink and games of chance and idols and divining arrows are only an infamy of Satan's handiwork. Leave it aside that ye may succeed. Satan seeketh only to cast among you enmity and hatred by means of strong drink and games of chance and turn you from remembrance of Allah and from his worship. Will you then have done?" (5:90-91)

Evidently, the above injunctions of Shariah are all embracive and flexible to the highest degree. By virtue of these characteristics they remain applicable after the lapse of thirteen hundred years and shall continue to be so in all the ages to come, just as they had been at the time of their revelation. Hence when we say that the Shariah is immutable, we mean that its framework is perfect and admits of modification.

Prohibition was not enjoined by the Shariah to suit conditions obtaining in ancient society; nor was it imposed in response to social needs. In fact, the idea of prohibition was absolutely alien to the people in those days, who were far from being prepared to accept it. The object of providing for prohibition was to make the Shariah inclusive of all that is essential for a complete, all embracive and everlasting law as well as to raise the standard of human society to the highest degree of consummation and sublimity. The non-Muslim world of today is anxious to impose prohibition and the people are mentally prepared for it. Obviously, the Islamic Shariah by its injunction forbidding the use of liquor, gave the clarion call to the Muslims to move thirteen centuries ahead on the path of progress.

Islam called upon the people to abstain from liquor as long back as the seventh century after the death of Christ. Only the Islamic countries responded to its call, while liquor continued to be in common use in the non-Islamic world. With the development of science however, it was proved at last that liquor is full of dangerous potentialities. It is highly injurious to health and a heavy drain on material resources; it weakens man's reason and enervates his progeny. The hereditary effects of excessive drinking on posterity are ruinous. Owing to this discovery of science, the movement for prohibition has gathered momentum. Consequently, organisations have been set up and funds collected to dissuade the people in various countries from the use of liquor. Moreover, special issues of newspapers and magazines have been published

to project the harm done by addiction to the intoxicants. The movement has really been a considerable success. From the widespread support of the social reformers and thinkers it may safely be inferred that the movement has now become universal.

The impact of this movement is manifest in the laws enacted and promulgated during the twentieth century. Only a few years ago a law to impose total prohibition was passed in USA. In India similar act was passed a couple of years back-. Governments of both the countries have declared the use of liquor absolutely unlawful. In most of the other countries partial prohibition has been imposed, banning the sale and purchase of liquor at public places during fixed hours of the day, and totally forbidding the offer or sale of liquor to persons under certain age limits.

In short, as it has been scientifically proved that liquor is extremely harmful to human being and the world is mentally prepared for a ban on its use, the campaign for prohibition is gaining momentum and the scholars and reformers are lending it every possible support. The day is not far off when all the nations of the world will enforce prohibition. In other words mankind which for thirteen hundred years has paid no heed to the Islamic Injunction of prohibition, is now responding to it.

(31) The concept of Polygamy

Islam has allowed polygamy right from the very beginning but under the condition that the husband can do justice to his wives. But if he thinks that he will not be able to do justice to them he is allowed to take one wife only. However, if he is sure that he can fairly treat all his wives, he is permitted to marry a maximum number of four women. The Quranic injunction to this effect is as under:—

> "Marry of the women who seem good to you, two or three or four; and if ye fear that ye cannot do justice (to so many) then one (only). (4:3)

The Shariah's concept of Polygamy has a philosophy of its own and it is in harmony with human nature as well as with the objectives which the Shariah lays down for polygamy.

The idea underlying the provision for polygamy is interrelated with adultery which the Shariah declares totally unlawful and for

which it prescribes the severest punishment so much so that adultery committed by a married person is punishable by stoning the offender to death. Obviously, the Shariah could not have kept the door open for adultery, while declaring it a heinous crime. Ban on polygamy Undoubtedly leads to adultery; for males are being out-numbered by females in the world. Each war results in an increase in the rate of female population. Prohibition of polygamy in such a situation would mean that a large number of women would be deprived of matrimony with the result that they would have to resist the demands of nature. As she will, of necessity, succumb to the increasing pressure of those demands, she will not be able to preserve her chastity and will ultimately fall into the abyss of sinful life.

Another thing to be taken into consideration here is that the sexual capacities of man and woman are not equal. The woman is not always capable of gratifying man's sexual desire because the period of her monthly course normally spreads over a week and sometimes over a fortnight. Intercourse during these days is unlawful. Again during her peuerperal period of forty days after childbirth, sexual intercourse is forbidden. Besides, the women sexual drive is at a low ebb during pregnancy and she is almost sexually benumbed during at least one third of her period of pregnancy. But man's capacity is always the same. Now, if he is forbidden to have more than one wife, he will feel naturally inclined to commit adultery as most men are incapable of curbing their sexual desire during their wives periods of menstruation, maternity and pregnancy.

By allowing polygamy, the Shariah has harmonised itself with human nature and assessed the relative libidinal capacities and impulses of the sexes with accuracy. Thus it does not subject man and woman to a test in which the chances of success are hardly ten percent; nor does it, by restricting man to a single wife, suffer some woman to remain unmarried all their life to yearn for husbands without ever having them, to dream the dreams of children and happy home never to be fulfilled, and to struggle against their sexual urge and in the process grow mentally and physically sick and lose their honour and chastity by seeking to gratify it unlawfully.

As males are often swayed by passion, the Shariah does not impose monogamy on man and thus have him at the mercy of his libido. Although the same is true of females, yet they have greater capacity to restrain their sexual urge than the males.

Polygamy is also in harmony with the object latent in sexual relations, that is, survival of the species. Marriage has been made obligatory for reproduction and giving rise to the family. Now, if the woman, a man marries, turns out to be barren while polygamy is disallowed, he will not be able to fulfil the aim of sexual function and the very purpose of marriage is also defeated. Man's fecundity is infinite, while the fertility of woman is limited. Man is capable of procreation at the age of sixty or even seventy which is also his maximum span of life. Woman, on the other hand, is capable of conception till the age of forty or at the most fifty. If monogamy is thrust upon man, it would mean that the door of reproduction is shut upon him for half the period during which he has the potency to perform this natural function.

The Islamic concept of polygamy puts an end to the harm and evil resulting from monogamy, ensures justice between women and elevates the moral standard of the society. The Islamic concept of polygamy is comprehensive and flexible to the highest degree and that is the reason why it remains applicable to this day and will continue to be so in future.

This injunction of Shariah was not intended for making adjustments with the prevailing social conditions. Since the Arabs of yore used to have unlimited number of wives, imposition of a ceiling on them was not palatable to those people. They had to divorce numerous wives in pursuance of the Quranic injunction retaining only four. However, provision for polygamy in Shariah limiting the number of wives was necessitated by the need to raise the social standard.

The Islamic doctrine of polygamy is one of those concepts which the modern law has not recognized as yet. On the contrary the westerners have in the past, regarded it with amazement or rather abhorrence. They have subjected Islam to criticism on account of polygamy. However, the merit of this doctrine is now coming to be recognized by scholars and reformers in the west. It is also a subject of comments in the western newspapers and

magazines. May be that the modern law accepts this Islamic concept as well at some stage. After the two world wars, the western mind is coming closer to it. This is because innumerable men perished and equal number of women were widowed during those wars. Thus the women have far out-numbered men.

But the horrors of war have not been the only factor setting the westerners to ponder over the legitimacy of polygamy. There are other factors, too, that have co-mingled to give rise to this trend. Some of them are enumerated here.

First, friendship between sexes has increased to such a proportion that one man has many lady friends to share his manliness, favours an income with his wife. In some cases the lady friends benefit much more from the man than his real wife does.

Second, adultery in the western world knows no bounds. It has produced serious effects. One of them is illegitimate children. The unmarried mothers either leave them stealthily on roadside in order to avoid scandal or do away with them by having abortion.

Third, the surplus number of women naturally desires to have husbands and children.

Fourth, the rate of reproduction has diminished in the west to a considerable extent.

In view of all these factors, the westerners are obliged to ponder over the merits of polygamy, which alone is the natural remedy for the evils that pose a serious threat to the western society.

(32) Evidence and Contract

The concepts of evidence and contract as presented by the Islamic Shariah are being dealt with here under the same title, the reason being that all the ideas pertaining to the subject have been expounded in the Holy Quran in a single verse about contracting a debt and that they are all interrelated. We will examine them with a view to bringing out the characteristics of the Islamic Shariah. The above verse is as under:—

> "O ye who believe! when ye contract a debt for a fixed term, record it in writing. Let a scribe record it in writing between you in (terms of) equity. No scribe should refuse

to write as Allah has taught him, so let him write, and let him who incurreth the debt dictate, and let him observe his duty to Allah his Lord, and diminish naught thereof. But if he who oweth the debt is of low understanding or weak or unable himself to dictate, let the guardian of his interests dictate in (terms of) equity. And call to witness from among your men to witness. And if two men be not (at hand), then a man and two women of such as ye approve as witnesses so that if one errata (through forgetfulness) the other will remember. And the witnesses will not refuse when they are summoned. Be not averse to writing down (the contract) whether it be small or great with (record of) the term thereof. That is more equitable in the Sight of Allah and more sure for testimony, and the best way of avoiding doubt between you; save only in the case when it is actual merchandise which ye transfer among yourselves from hand to hand. In that case it is no sin for you if ye write it not. And have witnesses when ye sell one to another, and let no harm be done to scribe or witness. If ye do (harm to them) lo, it is a sin in you. Observe your duty to Allah. Allah is teaching you. And Allah is knower of all things".

(2:282)

The text of the above verse comprises certain principles of law and jurisprudence. Some of them to be discussed by us are as follows

(33) The concept of written evidence

The Shariah makes it obligatory to record in writing a debt whether it is extended for a long period or a short one. This is clear from the following words of the Quranic verse quoted above:—

"O ye who believe! when you contract a debt for a fixed term, record it in writing." (2:282)

Similarly:

"Be not averse to writing down (the contract) whether it be small or great, with (record of) the term thereof."

(2:282)

The original Arabic Word *'Dain'* covers every obligation, for each obligation accepted by one party towards the other is in

the nature of debt from the obligee to the obligor. Hence the contract of debt implies all specific transactions including mortgage, purchase of things on credit and the agreement of work.[1]

But in case of hand to hand dealings, with both parties fulfilling their obligations there and then, such transactions need not be written down. For instance, purchase of a thing by a person in such a way as he obtains it from the seller by paying down the price thereof on the spot constitutes a hand to hand transaction which can be carried on without being recorded in black and white, whatever may be the price of the thing so exchanged. Such dealings are actually in the nature of an event and not an undertaking. And physical events may be proved by any method of testification. The injunction pertaining to writing is most comprehensive and flexible. It is applicable today just as it was thirteen hundred years ago and will continue to be applicable in future in quite the same way. It is because of such all embracive and flexible provision, it is not *amen-able* to any modification and change.

When the above verse was revealed, the Arabs were illiterate people who lived a very tough life in the immensity of inhospitable desert. They seldom entered into such transactions as required writing. Had the genius of the Shariah been the same as that of the man-made law, it would have contained provisions that suited the needs of the people, or for that matter, it would have been in keeping with illiteracy and ignorance of the Arabs. But the Shariah made it compulsory even for those illiterate people to record in writing their transactions whether big or small. This sublimity is the distinguishing mark of Islamic law.

The purpose of making writing compulsory was to persuade the Arabs to receive education so that their mental horizons might be widened, their minds cultivated, they might be able to understand the world better and come to grips with the other nations of the world and finally subjugate them. Apart from these purely political and social aspects of the injunction in regard to writing, there are. legal benefits of it as well, which include protection of

1. On this analogy every obligation constitutes a contract of debt, notwithstanding the literal sense or 'debt' conveyed by such a contract; for both in case of debt and obligation, both the contracting parties are under the obligation to exchange or do something on the expiry of the term fixed for the purpose.

rights, production of evidence and removal of doubt and misunderstanding.

By declaring writing as compulsory, the Shariah has expounded a great multidimensional doctrine. It was revealed to the Holy Prophet (S.A.W.) by Allah through the Holy Book in 7th Century, but is one of the most modern laws and theories of social life. Many countries made universal education compulsory in the nineteenth and the beginning of the twentieth century. This, in effect, is the application of Islamic doctrine in the political and social fields. The French made writing obligatory in any transaction that exceeded a fixed amount and all the laws of the western countries subsequently took the idea from the French. However, the legal experts are of the opinion that written evidence word not be complete and effective unless every dealing regardless of its magnitude as required by the law, is put down in black and white. They went on advocating this view until some of the European countries incorporated the doctrine in their laws. Similar attempts are being made in other countries. They are also expected to provide for it. In other words, the most modern doctrine of evidence in the present age is the one which the Islamic Shariah has presented and which now forms a part of the modern law. Legal experts in other countries, are stressing the need to adopt it in their laws as well.

(34) Evidence of Commercial Transactions.

As has already been explained, writing has been enjoined for the proof of lending and borrowing. But commercial dealings have been exempted from this general rule.

If need be, a transaction of lending has, likewise, been exempted from this rule. The following verse of the Holy Quran comprises the injunction to this effect:-

> "If ye be on a journey and cannot find a scribe, then a pledge in hand (shall suffice). If one of you entrusteth to another, let him who is trusted, deliver up that which is entrusted to him (according to the pact between them) and let him observe his duty to Allah. Hide not testimony. He who hideth it, verily his heart is sinful. Allah is aware of what you do. (2:283).

The Shariah allows to adopt other methods of testification to prove a commercial transaction:

> "Save only in the case when it is actual merchandise which ye transfer among yourselves from hand to hand. In that case it is no sin for you if ye write it not."(2:282)

The basic cause of exempting commercial dealings from the provision relating to writing is that such transactions are carried on speedily and there is hardly any time for recording them. Moreover, they are multifarious and innumerable, taking place ceaselessly. Hence if the condition of putting them down in black and white is imposed upon them as has been in the case of lending and borrowing, the buyer may run the risk of buying and the seller may suffer a loss on account of it. That is why the above condition has not been laid down for commercial dealings. The provision of Shariah to this effect, like all other provisions, is comprehensive and flexible to the highest degree. This is the reason why it admits of no amendment and is fully applicable today after the lapse of thirteen centuries.

A man acquainted with the history of the Arabs, particularly with the conditions obtaining at the dawn of the Islamic era, knows it fully well that the Quranic verse containing the above injunction was not in tune with the conditions prevailing at that stage of the social development of the Arabs. It was indubitably much higher than the standard of their social life. The injunction was revealed by Allah in order that an everlasting law might be complete in all respects and the social standard may be raised to divert the course of their development in the right direction.

There can be no better proof for the perfection and sublimity of the Shariah than the fact that its provision in respect of the conduct of commercial transactions is to be found in the most modern laws of the world and thus it may be regarded as the latest discovery in the field of law.

(35) Text of contract shall be dictated by the obligor

A general principle laid down by the Shariah is that the terms of the contract are to be dictated by the person incurring a debt or accepting an obligation. In other words this is to be done by the weaker party. The purpose of this provision is to

give protection to the weak party *vis-a-vis* the strong one, since the latter is likely to take advantage of his strong position and bind the weaker party by stringent conditions. If the strong party is a creditor, he will lay down hard conditions for the debtor and if he is an employer, hiring labour on fixed wages, he will try to *usurp* the rights of the workers by safeguarding his own rights. The workers or the debtors will not be in a position to lay down conditions in their interest or safeguard his rights. That is why the 'Shariah gives the right to dictate the contract to the weaker party enabling to safeguard his own interests, avoid confusion, be well conversant with the terms of the contract and be aware of his liability.

The problem to which the Shariah offers solution is the most important problem of modern age. It owes its origin to the industrial revolution of Europe in nineteenth century which brought forth in its wake innumerable factories and countless number of workers and employers. The most striking aspect of the issue is that the employers exploit the workers and the consumers by dictating stringent conditions that the latter have no choice but to acquiesce in, since the terms are printed on a prescribed form to which the man anxious to secure a job or consumer goods is obliged to affix his signature. The terms of the agreement are determined so as to benefit the employer or the manufacturer at the expense of the worker and the consumer.

This kind of transaction is legally termed as 'arbitrary contract'.

Many attempts have been made in the modern law to tackle this problem. For instance the manufacturer is bound by such conditions as may safeguard the interests of the consumer. Similarly, prices of commodities have been fixed. But so far as the problems between the employer and the workers are concerned, the modern law has been able to solve only some of them. The workers now get compensation in case of accident or dismissal. But total intervention in the affairs of the employers and the management is likely to affect production. Therefore, law cannot be brought to bar on all the terms of employment with the result that the most important aspects of the problem remain unsolved which

include wages, working hours, leave etc. The workers now try to get these issues resolved themselves by setting up their organizations, forming trade unions and resorting to strikes. They think that the problem cannot be solved unless they are allowed to dictate the terms. Some thinkers and writers fully subscribe to their view. In short workers in every part of the world clamour for their rights, suspend work and create law and order situation in order to achieve their ends. Their right has been partly recognised by the modern law. They are sanguine about getting it fully accepted sooner or later. The Islamic Shariah has recognised this right in its entirety by providing for the right of obligor or the weak party to dictate the terms of agreement. The Quranic verse relating to contracting a debt enjoins it as follows:-

> "and let him who incurreth the debt dictate and let him observe his duty to Allah his Lord, and diminish not thereof. But if he who oweth the debt is of low under-standing, weak, or unable himself to dictate, then let the guardian of his interests dictate in (terms) of equity".
> (2:282)

It is needless to emphasize the generality and flexibility of the injunction contained in the above verse. This is the very characteristic of Shariah by virtue of which it admits of no change or amendment. It is a provision which bears clear testimony to the sublimity perfection and justness of the Shariah. This golden principle was laid down by the Islamic law thirteen hundred years ago. The modern law has yet to provide for such principles in spite of all its advancement.

(36) Refusal to bear witness improper

According to the Islamic law it is wrong on the part of a man to decline to be a witness, when summoned to do so. It is also wrong to suppress or conceal anything to which one has been an eyewitness.

> "And witnesses must not refuse when they are summoned".
> (2:282)

'Refusal' here implies refusal to be a witness to a particular incident or transaction, when called to; for the verse relates specifically to bearing witness to the exclusion of giving evidence.

Divine injunctions as to suppression or misrepresentation of facts are as follows:—

"Hide not testimony. He who hideth it, verily his heart is sinful" (2:283)

"O ye, who believe, Be ye staunch in justice, witnesses for Allah, even though it be against yourselves, or (your) parent or (your) kindred, whether (the case he or) of a rich man or a poor man for Allah is near unto both (than' ye are). So follow not passion lest ye lapse (from truth) and if ye lapse or fall away, then lo! Allah is ever informed of what you do. (4:135)

As has already been mentioned these two provisions relate to hiding and giving evidence and declare false evidence unlawful.

It is the Islamic Shariah which the modern laws follow in prohibiting to give false evidence or suppress facts. But these laws have not yet reached the stage where refusal to hear witness constitutes violation of law. Thus the Islamic Shariah is undoubtedly superior to modern laws in this respect also, much as the public interest demands that rights of citizens should be protected, transactions among them facilitated, and nobody should be allowed to decline in bearing witness in matters wherein the people are likely to be deprived of their rights and their transactions complicated and delayed. Again, there are certain matters in which the presence of witnesses is absolutely essential; for instance, in the case of a contract of marriage, if refusal to bear witness is allowed, matters such as these will come to a standstill.

Moreover, provisions of the Islamic law for-biding refusal to bear witness and suppression of evidence or giving false evidence are characterised by generality and flexibility of the highest degree and bear testimony to the fact that the Shariah is not open to modification or amendment.

If you compare the Shariah to the modern law, you will find how sublime and comprehensive it is and that its provisions were not intended for keeping abreast of the development of the contemporary Arab society. They were rather needed for a universal, everlasting and perfect law and for elevating mankind to a social plane on which its collective standard might approximate to the standard of the ideal Shariah.

(37) Other Injunctions contained in the verse relating to a contract of debt.

In the Quranic verse under consideration four different doctrines have been expounded. Of these, two have been incorporated in the modern law, while the third is now being adopted. But the fourth doctrine is still out of the reach of modern law. However, the verse is not confined to only the four injunctions. There are other principles contained in it too, which include the provisions that the scribe, writing the contract, should he impartial, just and well conversant with the injunctions of Shariah; that two men or one man and two women are required to be witnesses of the document and that the scribe and the witnesses shall come to no harm on account of the transaction between the obligor and the obligee.

These are the general principles and it will be out of place to dwell at length on them in this volume since its principal subject is criminal law. We have hitherto discussed the constitutional, collective administrative and civil principles in order to bring home to our readers the sublimity, perfection and perpetual validity of the Islamic Shariah so that one may not be led to think that these virtues are to be found in some of the provisions of the Shariah, while others are devoid of them.

(38) A Word of Advice

Before coming to the main subject, I have a couple of words to say to those Muslims who labour under the misapprehension that the Islamic Shariah is incapable of fulfilling the needs of the present age. This notion contradicts the very belief to which they claim to hold fast and want to act upon, Allah says in the holy Quran:-

"Believe ye in part of the scripture and disbelieve in part thereof ? And what is the reward of those who do so save ignominy in the life of the world and on the Day of Resurrection they will be consigned to the most grievous doom. For Allah is not unaware of what you do."

(2:85)

My brothers in faith should bear it in mind that the real cause of our degradation and decline is that we have long ceased

to live up to Islam in its entirety. The Turk and the Mamluk be rulers in our history, decade matters as they pleased to serve their own ends. They cared to apply the provisions of the Shariah only in those spheres wherein they did not go against their wishes Since the springs of our backwardness lie in deviation from Islamic principles and ceasing to translate then into practice, it will be futile to adopt modern laws. On the contrary following the western countries blindfold would quicken the tempo of our decline. The only remedy for the downfall of the Muslims is to remove the basic cause thereof and to enforce Islam in their practical life.

We have long been following the course of acting on some of the injunctions of the Quran, while abandoning others. We believe in part of the scripture and disbelieve in part thereof. Consequently Allah debased and disgraced us in the past as we are degraded and infamous today. Our infamy and ignominy serve as an example to the nations of the world. There is no way out of this predicament unless we are determined to rebuild our character and resuscitate our Soul, believe in the Quran and Sunnah in all sincerity and firmly and enforce Islam in its entirety. Allah whose word alone is true tells us:-

"Lo Allah changeth not the condition of a folk until they first change that which is in their hearts."

(13:11)

Muslims of the earliest period believed fully and profoundly and theirs was the best faith, indeed, with the result that Allah made them rulers of the world. He bestowed upon them leadership of mankind notwithstanding their numerical insignificance and weakness. So also can Allah make us the masters of the earth provided that we have deep rooted and complete faith in Him and His Prophet. This is exactly the promise He holds out to those who unflinchingly believe in the scripture and translate Allah's Shariah into action as a whole.

"Allah hath promised such of you as believe and do works that He will surely make them to succeed (the present rulers) in the earth even as He caused those who were before them to succeed (others)." (34:55)

"Now has come unto you light from Allah and a plain scripture, whereby Allah guideth him who seeketh His good

pleasure unto paths of peace. He bringeth them out of darkness unto light by His decree, and guideth them unto a straight path." (5:15-16)

(39) Mode of Discussion

The first part of this volume comprises a general discussion of criminal law. The subject requires to be treated under two heads:

(1) Crime and
(2) Punishment. Hence we have split it up into two separate parts.

A discussion of crime requires that it should first be treated of in general and then its fundamental elements should be dealt with. This necessitates the division of the first part into two portions; the one consisting of a general discussion of crime and the other of its fundamental elements. Each portion contains various chapters, sections and a consideration of other necessary matters.

Discussion of punishment includes an exposition of the nature, principles, kinds and plurality of punishment and matters relating to enforcement and invalidation thereof.

PART I

A GENERAL DISCUSSION OF CRIME AND FUNDAMENTAL ELEMENTS THEREOF

PLAN OF PART I

(40) In this Part we will first discuss two aspects of crime

1) The nature of crime

2) The kinds of crime

They will be dealt with in separate chapters.

CHAPTER I

(41) Definition of Crime

Crime as defined in the Islamic Shariah consists in legal prohibitions imposed by Allah, whose infringement entails punishment prescribed by Him.[1] Legal prohibition means commission of forbidden act or omission of an act enjoined. Characterisation of such prohibitions as inhibitory under the Shariah implies that a crime is a crime only when it constitutes an act forbidden by the Shariah.

Hence the commission of any act declared unlawful and for which punishment has been laid in the Shariah is a crime. Similarly omission of any act enjoined and omission whereof declared unlawful by the Shariah constitutes a crime. In other words, commission or omission of any act, whose commission or omission as the case may he, entails a punishment laid down in the Shariah is a crime.

The above definition of crime implies that no act whether committed or omitted amounts to a crime or offence unless specific punishment for commission or omission thereof has been laid down in the Shariah. The jurists of Islam construe punishments as rewards. In short, if the commission or omission of an act does not entail a prescribed punishment such an act cannot be treated as a crime.

Crime as defined in the Shariah is identical with crime as defined in modern law, which also defines it as the commission of an act declared wrongful, or omission of one enjoined. Similarly modern law is in complete agreement with the criminal law of Islam in excluding such acts from the definition of crime as do not entail specific punishments.[2]

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1. *Mawardi Al-Ahkam-ul-Sultania,* p.92.
2. All Bek Badwi - *Al Ahkam-ul-'Amma Fill Qanoon-al-Janai* Part I, p.39, *Al Mausoo-a-tul-Janai,* Part III, p.6

(42) Crime and Janayat

The jurists of Islam often use the term janayat also for an offence. Janayat is an Arabic word which means any misdeed committed by a person. It is an infinitive used as a noun and comes from an idiom meaning 'One person has committed an evil act on another'. The word janayat is commonly used in this sense but as a legal term it connotes a misdeed prohibited by law. The jurists apply it to any act declared unlawful by Shariah whether it is committed against the life and property of a person or against anything else. But a majority of jurists apply the term in the sense of offences resulting in the loss of life and limbs such as murder, causing bodily injury, physical violence or wilful abortion.[1] Other jurists reserve the term janayat' for crime punishable by *'hudood'* or qisas.[2]

Leaving aside the use of term by some jurists to mean certain offences, we can safely assert that as a technical term of Islamic jurisprudence, 'janayat' is synonymous with crime.

In the Egyptian law the word *Janayat,* however, conveys a sense different from what it connotes in the Shariah, under section ten of the Egyptian Penal Code *Janayat* is applied to offences punishable by death, hard labour for life or just for simple imprisonment. But if an act is punishable by a term extending to more than a week or a fine amounting to a hundred *'qaresh'* or entails more severe punishment still. It is known as *'junha'* (felony). But if an act is not punishable by a term exceeding a week or a fine amounting to a hundred *qaresh,* it is termed as *mukhalifat* (misdemeanor) in section eleven and twelve of the Egyptian Penal Code.

But according to the Islamic Shariah every offence is *'Janayat',* whether it entails imprisonment fine or a more severe punishment. For this reason *mukhalifat* or misdemeanor in the legal sense of the word as well as junha or felony will be treated as *janayat.*

The basic difference between the Shariah and the modern law is that the former treats every offence as *Janayat* while the latter regards only major crimes as such.

1. *Al Bahr-ul-Raiq,* part VIII, page 286 *Aud Al-Zela;* Part VI p. 97.
2. *Tabsarat-ul-Hakkam,* part II, pp.210

43) Explanation to Declaration of an act unlawful and prescription of Specific Punishment for it.

Acts declared offences are those whose commission has been enjoined or prohibited, much as commission or omission thereof is detrimental to established social order, beliefs, individuals life, property and honour and to accepted ideas. Moreover, there are many other considerations calling for collective security as well as for safeguard against loss or deficiency.

Punishment is prescribed for a crime so that the people may refrain from committing it, since mere prohibition or command is no guarantee against its commitment. In the absence of punishment a command or prohibition will be of no consequence. It is through punishment alone that command or prohibition could be intelligible and meaningful. It is from fear of punishment that people abstain from committing offences, causing disturbance, acting harmfully and doing good instead. Punishments have been given legal status only in the public interest. They are not beneficial in themselves. In fact, they are intrinsically evil. The Shariah provides for punishment, much as, they serve as a means to achieve collective good and to safeguard it. Crimes may also be beneficial to a certain extent, but the Shariah prohibits them notwithstanding the benefits accruing therefrom, as they lead, in the final analysis, to breach of peace. For instance, as they lead, in the final analysis, to breach of peace. For instance, adultery, use of liquor, theft, offering oblations as shrines or temples, idolatry, extortion, abandoning one's family or non-payment of Zakat are all such acts as benefit a person in some way or other, but they are absolutely immaterial to the Law-giver. He declares them unlawful as they are ultimately detrimental to the society as a whole.

Acts purely beneficial or purely harmful are uncommon. A great majority of acts are both beneficial and harmful at the same time. Man has a natural propensity for things prospective of gains rather than of losses. Obversely, he does not like things wherein loss outweighs profit. That is why he prefers things which benefit him even if they are against the interest of the community, and avoid those wherein he is likely to incur a loss,

although they may be helpful in fostering the common weal. Similarly, when a man considers the hardships involved in the discharge of his duty, he would naturally feel inclined to evade it. But when he takes into account the punishment of neglecting his duty, he would prefer to bear the hardships involved in it. The purpose of enjoining punishment is that the people should be induced to do disagreeable things in the public interest and prevent them from doing things harmful to the community. This is exactly what the Holy Prophet meant when he said:

"Heaven is encircled by unpleasant things and Hell by sensual desires."

No doubt there always exist some individuals who do certain things simply because they have been enjoined and avoid to do certain things simply because they have been forbidden and not for fear of punishment entailed by either course of action. They do or avoid things inasmuch as they feel ashamed at the prospects of being looked upon as disobedient people. That is why they take the lead in obeying Allah and His Apostle and take care of public interest. But such individuals are rare, whereas commands are intended for the majority of people and not for a tiny minority.

To sum up, Islamic Shariah has identified certain acts as crimes and prescribed specific punishments for them with a view to safeguard collective interests and the system on which the entire social edifice rests and to enable the community to survive with moral values and harmony. The disobedience of an offender does not do any harm to God Almighty who has laid down the injunctions of Shariah for us to live up to. The disobedience of the entire world does not affect Him in the least nor is He benefitted by obedience even if the people of the entire world abide by his commands. Allah has, by His own grace taken it upon himself to be Merciful to His servants. That is why He sent merciful messengers to all the nations of the world so that they may be delivered from the darkness of ignorance, led into the light of guidance, prevented from sin and induced to obey Allah.

(44) The Islamic Shariah and the modern law.

The Shariah and the modern law both agree that the

identification of crimes and prescription of punishment for them are designed to safeguard the interests of the community and social system as well as to ensure the survival of the community. But notwithstanding this overt agreement, the Shariah differs from the modern law in two points.

(45) First point of Difference between Shariah and modern law.

The Shariah regards moral virtues as the principal base of society. For this reason it lays such a great stress on these virtues that it declares all there acts culpable which are inimical to morality. The modern law, on the contrary, completely ignores morals and does not concern itself with them so long as acts repugnant to them do not directly prejudice the individuals, public order and peace and tranquillity. Thus according to modern law auditory is punishable only if rape is committed on a person or one of the two parties involved is subjected to coition without his or her consent. In either case adultery is directly harmful to the individual as well as public peace and tranquillity. But the Shariah regards adultery as culpable at all events since it considers such an act as a crime detrimental to morality. For moral deterioration, leads to the decay and disintegration of the community. In most of the modern laws, as opposed to Shariah, no punishment is laid down for the use of liquor or for simply being drunk. Under these laws a man is to be punished only when he is found moving about on a thoroughfare in a state of intoxication, for in that case he would be a nuisance to others. In other words, the punishment so prescribed is based on the consideration that to be drunk is bad in itself, and that it is injurious to health and detrimental to morals as well as property. Shariah, on thc contrary, enjoins punishment for the use of liquor whether or not it produces intoxication, since it takes into account the ethical aspect of crime which gradually embraces all the aspects of life. If morals remain intact, life and property honour and prestige, peace and tranquillity will also be immune.

The Shariah takes meticulous care of morals because its springs lie in religion which enjoins inculcation of moral virtues and induces man to do good. It aims at the creation of a righteous and pious society. Inasmuch as Islam does not admit of any

modification addition or reduction, its Shariah will continue to emphasize the vital importance of morality as long as the religion of Islam exists and will deal severely with every immoral individual.

Modern laws attach no importance to morality because they owe their origin not to religion but to the actual situation and to those customs and conventions with which the people have been familiar and which they have adopted. The men who frame modern laws hold sway over the society because of their collaboration with the people in authority. When they make laws, their wishes, failings and their propensity for unrestrained freedom are projected into them. In short, modern laws are prone to changes under social pressure and according to the wishes of those who keep them in force. The result of this would inevitably be that the laws so made and enforced would gradually move away from morality so much so that depravity would be the rule and moral virtues would be exceptions. Countries where modern laws are in force have actually reached this stage of moral bankruptcy.

Consequent on this basic difference between the Islamic and the modern laws, the countries where Shariah is in force, have a very long list of acts that constitute offences of moral nature and prevention of these offences leads to moral improvement and promotion of spiritual values. But in countries where modern laws are effective, the moral standard is lowered to its nadir, spiritual values vanish as material values are fostered, beastly acts are common and human qualities are weakened. In such countries only a few acts are left to which the expression 'moral offences' can be applied.

(46) The second Point of Difference between Shariah and Modern Law.

The springs of Shariah lie in the supreme Being as it is based on the religion revealed by Him. The modern laws on the contrary emanate from the minds of men who make them. If any one studies the crimes and their punishments as determined by the Shariah, he will find that some of the criminal acts specified in it as offences coupled with specific punishments thereof have been determined in the Holy Quran. There are others whose punishments have been determined by some Tradition or act of

the Holy Prophet (S.A.W.). There are still other acts that may be declared as offences and punishments laid down for them by the body in authority. But no authority has been empowered to do whatever it chooses. Certain conditions have been laid down according to the rules of the Shari'ah and spirit of Islam for declaring an act as an offence and for determining punishment thereof accordingly. The authority has no power to prohibit what has been declared as lawful by the Shariah and or permit what has been forbidden by it or award punishment for acts that Shariah does not consider punishable or the punishment thereof is repugnant to the spirit of Shariah. Hence it may be said that all categories of criminal laws contained in the Shariah are revealed by Allah, although certain offences and punishments thereof may be determined by man but he too does it within the limits laid down by God Almighty

(47) The Effects of Divine Character of Shariah.

The fact that Shariah is the revelation of Allah has produced two effects.

1. First Effects.

Its effects, in the first instance, is that the provisions of Shariah have assumed immutable and everlasting character. No change of ruler or government makes any difference in them whatsoever, nor does the changeability or permanence of government makes any impact on those provisions. Again, the form of government whether democracy or monarchy, does not in any way affect the principles of Shari'ah. For these principles have nothing to do with the form or system of Government. They are rather linked with Islam which does not admit of any change and in which every ruler must necessarily have faith and must exploit every method and system to enforce. it. Modern laws on the contrary are put into effect by the rulers in order to uphold the principles they believe in and support the system they wish to establish. That is why these laws are successively subject to modification. The change of Government and its system serves as an adequate justification for the amendment of laws and regulations.

2. Second Effect

Another effect of the divine character of the Shariah is that its principles are highly respected. Both the rulers and the ruled consider them sacred since they believe that they have been revealed by Allah and that it is, therefore, incumbent upon them to respect those principles. This belief motivates the people to act on the injunctions of Shariah inasmuch as obedience of Allah brings man closer to Him while sinning and disobedience incurs punishment in this world and torments Hereafter. As the Islamic Shariah is attributed to Allah it inevitably follows that the people must respect it and translate it into practice. The universal criterion of judging a law is the extent to which the people respect it at heart. In this respect on other law stands compression to Islamic Shari'ah. Doubtless, the people will be relieved of their difficulties in proportion as they respect and abide by the law and thus the problems confronting them will easily be solved.

This then is the status of Shariah which is attributed to God Almighty. As opposed to the Shariah, the human law is made by the group of people in power. That is the reason why such a law safeguards the interests of the rulers, protects them from harm, makes allowance for the principles they believe in and maintains the system established by them. When one ruling group is maintained by another, the law is modified so as to protect the new junta, make allowance for the new principles and supports the new system. Man-made laws, in brief, are amended in accordance with the change of ruler, principles and systems. This process of change and modification goes on ceaselessly with the result that the people cease to hold the law in esteem and become insensible to its sanctity.

In fact they have no respect for law at all. This may be illustrated by the attitude of opposition parties which incite their workers to violate laws so that they may achieve their ends by trampling the corps of the law. The opposition parties, the new movements and subversive groups are aware that law they break is made by men like themselves and that it is designed to safeguard the interests of men who are no better than themselves and to subversive a system which they, look upon as the worst. The manner in which the systems of Government and rulers are replaced

and the forms of Government are changed is indicative of the fact that the laws command no respect. As this state of affairs continues, the laws become worthless.

We should always bear it in mind that the Shariah is ascribed to Allah as the logical result of our faith. Any one who believes that Islam has been revealed by Allah must necessarily attribute the Shariah also to Him. For Shariah alone is the law of Islam that covers all the injunctions relating to worship, transaction of personal affairs and criminal laws. The Islamic Shariah is not intended for the promotion of any individual, group, race or system. Its main object is the service of mankind regardless of race, colour or the system of life. It is, moreover, designed to ensure equality and justice between men and to make things easier for them. Allah is in no way benefitted by ascribing the Shariah to Him. He is absolutely independent of created beings. Its imputation to Allah, as a matter of fact, benefits the erring humanity since it is blessed thereby with guidance, stability confidence and gratification and its life is organised on principles of mutual love, sacrifice, equality and justice.

(48) Malversations or Acts of Corruption

The jurists of Islam do not differentiate between crimes falling under the category of offences and corrupt practices as the pundits of modern laws do. One of the reasons for this is the nature of punishment prescribed by the Islamic law. Another reason is the effort to ensure justice. The Shariah subdivides crimes into three categories, viz.; crimes involving

(1) *hudood,*
(2) *qisas and*
(3) *punishment.*

Now if a corrupt practice constitutes a crime calling for *a hud* or *qisas,* the culprit shall be punished accordingly. Similarly if the accused is sentenced to a hud or qisas he shall not at the same time be liable to disciplinary action and to a punishment of disciplinary nature. For disciplinary punishments shall inevitably constitute punitive measures which is another name for penal punishment. In other words the offender will be awarded two punishments for a single, offence; whereas the punishments of

hud and qisas as provided for by the Shariah are more severe punishments which contain adequate disciplinary measure as well as an element of censure.

If the offender is a civil servant he may be dismissed or suspended and his dismissal or suspension may also be treated as punitive measure necessitated by the offence he may have been guilty of. However, it will also be true to say that his dismissal or punishment is not designed to punish him but that either measure is necessitated by the offender's failure to discharge his responsibilities and loss of efficiency for the due performance of his job. For offenders are not appointed to any posts and if a person holding an office commits a crime, he is disqualified for continuing in the office and proves himself to be inefficient for the discharge of his duties.

If an employee commits a crime which does not warrant a *hud* or qisas, it will be a penal offence regardless of the fact that its penal character is proved with reference to any provision of the Shariah or it is declared an unlawful act by a legislative body in exercise of the powers conferred thereon by the Shariah. And no case of disciplinary nature will be instituted against an offender committing a crime that constitutes a penal offence. For disciplinary measures such as warning, admonition, dismissal etc. are all identical with penal punishments. Now, if a person, against whom a disciplinary case has been instituted already is prosecuted once again under the criminal law and in each case is awarded penal punishment, it means that he will be sentenced to penal punishment twice for a single act, which in reality is punishment of criminal nature. This is what the Shariah forestalls; for one of its basic principle is that "a person shall not be punished twice for the same act." In short what impedes the treatment of a crime as disciplinary is the consideration that it will be deemed as a criminal act also and the punishment he gets as the result of disciplinary proceedings will be identical with the sentence passed in the criminal case. In other words the real difficulty in recognising the bonafides of a disciplinary crime is the identity of crime and the identity of punishment.

The grounds on which the Islamic Shariah repudiates the bonafides of a disciplinary offence are to be found in abundance

in modern laws in a much as these laws draw a line of distinction between penal punishments and disciplinary punishments, while most offences of disciplinary nature do not fall within the province of criminal laws. The inevitable result of this marking off punishments from punishments and crimes from crimes is that two different cases are instituted against the offender in respect of the same crime and a sentence passed in the one does not impede any sentence to be passed in the other. The legal experts explain away this punitive duplication on the plea that the aim of disciplinary action is to safeguard the interests of service, while the aim of a criminal case is to safeguard the society.

It is beyond doubt that the position of Islamic Shariah in this respect is more cogent and is closer to the principles of modern jurisprudence which disallows institution of two cases against a person for the same crime. Another advantage of the position Shariah takes is that the judgments become concise and the number of cases is considerably reduced. Moreover, the law does not stand between the personality of the offender and the punishment of the offence he is alleged to have committed.

(49) Civil Offences

The Islamic jurists are not unfamiliar with the nature of civil crime altogether, but they have not given a name to it. We have come to employ the term civil offence under the influence of the French Law.

The Islamic Shariah, in principle declares the right to life and property as inviolable. Hence any act of a person that may prove harmful to another person's life and property to which the former has no right would necessitate imposition of penalty on the former. If the act is culpable the penalty would be penal punishment and if it is not culpable the penalty would be material punishment. Again if the harmful act is culpable, it is an offence; and if it is not, it does not warrant the application of the term offence. In this case it would be a harmful act pure and simple. Hence there is nothing in common between crime and harmful act except that both of them entail penalty. Let us, for instance, take two cases by way of illustration: the one involves hunting of an animal in the preserve of some one else; while the other

relates to drinking of liquor belonging to a Non-Muslim without his permission. In either case the culprit will not only be liable to punishment but will also have to pay the price of the game or the liquor.[1]

The Shariah is in agreement with the modern law in this respect. Thus the Shariah holds a person responsible on civil grounds for any act that does harm to others, regardless of the fact whether or not such an act constitutes an offence under the law in force. If the act in question is criminal as well as harmful, the person committing it shall not only be treated as liable to punishment but shall pay the penalty for it as laid down by the Shariah.

The interpreters of Egyptian Law use the epithet 'harmful' for an act constituting a civil offence. But the term has not gained currency in the courts as the judicial sphere is limited by the books on Shariah. The reason for this appears to be that the Egyptian law attributes penalty to a harmful act and does not like the French Law term such an act as civil offence.

1. *Sharh-Fath-ul-Qadeer.* Part IV pp 261

SECTION I

Classification of Crimes on the Basis of Punishment.

(50) Hudood - Qisas and Diyat and Penal Punishments.

All crimes are unlawful acts entailing punishment. Thus punishment is the common factor in all of them. But looked at from another angle, it will be found that crimes are various and multifarious. It is, therefore, possible to classify them differently from specific viewpoints.

Hence when crimes are judged by the criterion of the rigour or mildness of punishment, they fall under the following categories

(i) Hudood
(ii) Qisas and *Diyat* and
(iii) Penal punishments.

When looked at from the viewpoint of intention, they may be classified in to:

(1) intentional and
(2) unintentional crimes.

However, if we consider the time of their coming to light, they may be treated as

(1) doubtful and
(2) certain.

When we take into consideration the manner of commission, crimes may be subdivided into the following categories:-

(i) Positive crimes
(ii) Negative crimes
(iii) Simple crimes
(iv) Habitual crimes
(v) Occasional crimes and
(vi) Un-occasional crimes.

Again, if crimes are looked at in consideration of their specific nature, they fall under the following heads:—

(i) Crimes against society
(ii) Crimes against individuals
(iii) Professional crimes and
(iv) Political crimes.

(51) Crimes Classified according to the rigour or mildness of punishment.

(i) Hud
(ii) Qisas and *Diyat* and
(iii) Punitive Punishments.

(52) Crimes fall under three categories in accordance with the rigour and mildness of punishment.

(i) Crimes involving hudood.

This is the category of crimes for which huds are laid down. A hud may be defined as the punishment prescribed as the right of Allah.[1] In this definition prescribed punishment means that both the quantity and quality thereof is determined and that it does not admit of degree. And what is meant by its being prescribed as the right of Allah is that the individuals and the community cannot annul it.

Punishment is treated as the right of Allah in the Shariah in consideration of the demands of public interest which implies that the people should be ridden of breach of peace and their safety and security is ensured. Any offence that does harm to the people and the punishment thereof correspondingly benefits them, its punishment must necessarily be treated as the right of Allah. Such punishment is not amendable to invalidation by the individuals or the society.

Crimes involving *hud* are clearly determined and their number is limited. They are seven in all, namely:-

(1) Adultery (2) False Allegation of Adultery (3) Drinking. (4) Theft (5) Bloodshed and Pluner (6) Apostasy and (7) Rebellion.

1. *Fath-ul-Qadeer* Part IV, pp. 112-113
Al- Iqna' Part IV, p. 44
Al-Ahkam-ul-Sultaniyah, p. 192-195
Badae'-wal-Sanae', Part VII p. 33-56.

The Islamic jurists call all these crimes as huds without mentioning the word crime. They apply the term *had (hudood)* to punishments as well, mentioning, in this case, the corresponding crime. Thus the expressions they use, are the *had* for theft, the *had* for drinking etc.

Crimes Involving *Qisas* and *Diyat*

These are five in number, viz.

(1) Wilful murder
(2) Suspected wilful murder
(3) Murder committed by error
(4) Intentional wrong other than murder and
(5) Unintentional wrong other than murder.

Wrong other than murder means an offensive act that does not result in death such as causing injury to a person or subjecting him to violence.

Some jurists generally place the crimes just mentioned under the category of felony or *'Janayat'* since this term is applicable to wrongful or outrageous acts explained above.[1] But others, classify it as jiran, or injuries' in as much as injury is the most common form of wrong.[2] There are still others who prefer the term Ad Dima for the crimes in question.

Crimes Involving Penal Punishments

There are the crimes for which one or more penal punishments are awarded (punishment here connotes corrective action). The Shariah does not lay down any limit for such crimes. It actually prescribes a set of punishments ranging from light punishments to harsh ones. The decision to award any punishment included in this set of corrective measures in consideration, of the circumstances of the case is left to the discretion of the judge.

Crimes involving penal punishments are not limited like those entailing *hudood* or *diyat.* In fact, it is impossible to lay

1. *Badae'-wal-Sanae'.* Part VII, p. 233.
Al Iqna', Vol. IV p. 162.
Al Bujairi Al Minhaj, Vol.:IV, p.129.
2. *Tuhfat-ul-Muhtaj* Vol. IV, p.1.
Al-Mughni Vol. IX p. 218.
Mowahib-ul-Jaleel lil Khattab. Vol. VI, p. 230.

down any limit to them. Some of these have of course been mentioned in the divine injunctions and they are these offences which are always treated as such; for instance, usury, breach of trust, abuse and bribery. Decision in respect of crimes of penal nature have been left to the discretion of people in power. But the Shariah has not conferred on the rulers unqualified powers of determining crime and has laid down the condition that an act should be treated as penal crime consistent with the situation obtaining in the community and its existing setup so as to safeguard its interests and maintain public order. Moreover, the treatment of an act as a penal crime should not be incompatible with the provisions of Shariah and the fundamental principles thereof. Conferring the right of law-making on the rulers by the Shariah within these limits is designed to organise the community, guide it in the right direction, safeguard its interests and to prepare the people to guard collective interests and deal with changing conditions.

The difference between a crime determined by the Shariah and one treated as such by the people in power is that the former is unlawful at all times while the latter may cease to be a crime when the act constituting it comes to be in the public interest at any time.

(52a) Importance of the Classification of Crimes under Consideration.

There are a good many grounds on which the Shariah divides crimes into *hudood, diyat* and penal punishments. These are as under:—

1. The Basis of Pardon.

No pardon is admissible in respect of crimes involving hudood. The aggrieved person or even the head of the state or the person in authority is incompetent to grant pardon in such a case. The pardon so granted will be ineffective and senseless.

However, in the case of a crime involving *qisas* the aggrieved person may pardon the culprit and his pardon will be effective. So the person wronged can forgive *qisas* done to him. He has the right to forgo *diyat* also. The offender will go unpunished if the

aggrieved party remits either punishment. The head of the state has no powers to condone crimes involving *qisas*. It is only the person wronged or his heir who can pardon such crimes. If the person, against whom such an offence is committed has no heir or guardian, the head of the state will be treated as his guardian; for according to the Shariah the sovereign is the guardian of the person who has no heir. Thus it is only in his tutalary capacity and not in any other capacity that the head of the state can pardon the offender provided that the pardon so granted is not ground less.

So far as the penal crimes are concerned the man in authority, that is, the head of the state is empowered to forgive the crime or remit the punishment. His pardon in this case will be effective provided that the pardon granted by him does not prejudice the rights of the aggrieved person. The aggrieved party can pardon only that crime which is detrimental to his own rights. But if such a crime is to the prejudice of the community or the society as a whole, the pardon or remission conceded by the aggrieved party will not be effective. But if, in the prevalent situation the punishment awarded to the offender is reduced by the pardon so conceded, the pardon will come into force; for in such cases the judge enjoys extensive powers of granting pardon in consideration of the conditions obtaining at the moment and the pardon conceded by the aggrieved party will indubitably be respectable as circumstantial justification.

If the commission of a crime involving a *hud* is established, the judge has no choice but to pass the sentence prescribed by the Shariah. He is not competent to reduce or enhance it; nor does he have the powers to commute such a sentence into some other sentence or stay the execution thereof. Thus in the case of crimes entailing *hudood* the powers of the judge consist only in awarding the prescribed punishment.

When one of the crimes falling under the category of *hudood* is established, the powers of the judge are confined to passing the sentence laid down in the Islamic law. In case the crime entails *qisas* and the aggrieved party forgoes it or the execution of the sentence is any way found to be inconsistent with the provisions of the Shariah, the judge is bound to order the payment

of *diyat,* unless the aggrieved party forgoes that, too. However, if the aggrieved party decides to relinquish *diyat,* the judge, who enjoys vast powers of awarding penal punishments, will sentence the offender to penal punishment in case of penal punishments extensive powers have been conferred on the judge. He is empowered to determine both the nature and extent of punishment. He may award harsh or mild punishment in view of the circumstances of the offence and the offender. Again, he is competent to pass a sentence of high or low order and to issue orders of its execution or stay.

2. In Consideration of the Acceptability of Circumstances Warranting Remission.

Circumstances warranting remission do not affect crimes involving *qisas* or *diyat,* for in such cases punishment is essential, whatever the circumstances of the offender. However, in the case of penal crimes, circumstances admitting of remission do affect the nature or quantum of punishment. The judge has the power to reduce the punishment to the lowest degree. He is even competent to stop the execution of the sentence.

3. In Consideration of the Establishment of Crime.

The Shariah has determined the number of witnesses to establish the commitment of various crimes falling under *hudood* or qisas (provided that any evidence other than witnesses does not exist). Thus adultery can be proved by providing four witnesses present at the time of the commitment of crime. The minimum number of witnesses needed to establish other crimes entailing *hudood* or *qisas* is two. As for a crime of penal nature only a single witness would suffice to prove it.

This classification of crime is unknown to the modern laws. Most of these laws divide crimes into offences, misdemeanour and contraventions.

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CHAPTER II

Crimes Classified In Accordance With Intention

Intentional Crimes and Unintentional Crimes

(53) Crime fall under two categories according to the offender's intention:—

(1) Intentional Crimes
(2) Unintentional Crimes.

1. Intentional Crimes.

An intentional crime is an unlawful act which an offender commits having the knowledge of its illegitimacy. This is what intention means with reference to crimes in general. But intention conveys a specific sense in the context of murder. Here it implies that the act is committed wilfully and with the full consciousness of its outcome. For, if the offender intends to commit such an unlawful act without being conscious of its result, it would mean quasi murder. In modern law this is interpreted as injury resulting in death.

2. Unintentional Crime

Is an unlawful act which the offender does not actually mean to commit but commits it by mistake

There are two kinds of acts committed by mistake:—

(a) An act committed intentionally and resulting in a crime, which the offender does not mean to commit but in the commitment of whereof he makes a mistake. For instance, a person throws away a stone to clear the way but it hits a passer by; or shoots an arrow at his game but it hits a human being. Again, it refers to an act wherein the mistake springs from the offender's imagination; for example, a person shoots an arrow at an object mistaking it for an animal but the object actually is a human being. Let us take another example:A soldier mistaken

for the enemy is killed in the battlefield, but in reality he is the citizen of the country. His killing amounts to homicide committed by mistake. In cases such as these, what the criminal intends is the actual act but the act results in the crime unwillingly.

(b) The other kind of unintentional crime pertains to those cases in which the agent does not intend to commit either the actual act as such or the crime resulting therefrom, but such an act occurs owing to his negligence or carelessness. An example of such unintentional crime is the case of a person who turns in his sleep and falls on another person lying by the side and crushes him to death. Again, such a crime may be illustrated by the example of a careless person who digs a well on a thoroughfare but does not take necessary precautions for saving the people from falling into it.

(54) The Significance of Classification in Accordance with Intention.

This classification brings out two aspects of crime; viz.;

(1) Intentional offence indicates criminal tendency in the agent whereas unintentional crime suggests no such tendency. That is why the punishment for the former is severe while that awarded for the latter is light.

(2) In the case of intentional crime no sentence is passed unless it is established beyond doubt that the crime is committed wilfully. But in case of unintentional crime punishment is awarded for slightest negligence or carelessness on the part of the agent.

This classification of crime is to be found in the modern law as well, which is consistent with the Shariah in respect of its subject and outcome.

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CHAPTER III

Classification of Crimes in Accordance with the Time of Revelation Thereof

Doubtful Crimes
Doubtless Crimes

(55) Crimes fall under two categories in accordance with the time of their revelation.

(1) Undoubtful crimes.

(2) Doubtful crimes.

(1) Undoubtful crimes are those which are found out at the time of their commitment or shortly thereafter. According to the eighth section of the Egyptian law as to the investigation of crime, the detection of crime in the very act of commitment means that the offender is seen committing the crime or immediately after the commitment thereof. If the person affected by the crime committed by the offender persues the latter shortly after the crime is committed, or if the people give him a chase raising a hue and cry or if the offender has in his possession weapons, instruments or other equipment on the basis of which it may be proved that he is the culprit or an accomplice of the culprit, such circumstances as these will be treated as if the offender has been seen committing the crime.

2. Doubtful crimes are such crimes as are not found out at the time of commitment or are detected long after commitment thereof. But according to jurists of Islam doubtlessness of a crime means that it is revealed just at the time of commitment. However, there is no provision in the Shariah standing in the way of placing reliance on the circumstances mentioned in the Egyptian law, especially when the purpose of placing reliance on such circumstances exists, that is, the revelation of crime to facilitate the passing of judgment.

for the enemy is killed in the battlefield, but in reality he is the citizen of the country. His killing amounts to homicide committed by mistake. In cases such as these, what the criminal intends is the actual act but the act results in the crime unwillingly.

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(56) Significance of Classification Under Consideration.

The significance of this classification manifests itself in the Shariah in two different ways:-

First, in accordance with the proof of the crime If the crime is one of those involving *hud* and the proof required thereof is the evidence of witnesses, it is essential that the witnesses should have seen with their own eyes the crime being committed and offender in the act of committing it. Imam Malik considers even the evidence of such witnesses[1] admissible as have heard of the crime and of the offender from the eye-witnesses and simply quote the statement of the latter that they have actually heard. But the rest of the authorities on Islamic jurisprudence do not consider this admissible.[2]

Second, in accordance with the principle of urging the people do good and preventing them from doing evil:- When the offender is seen committing the crime it is the right of everyone to prevent him forcefully from committing it and use necessary force for the purpose regardless of the fact whether the crime constitutes the infringement of the rights of the individuals such as theft or those of society as a whole such as drinking and adultery. This right is called the people's lawful right of defence.

1. *Al-Mudawwana*
2. *Badae'-wal-Sanae' article* 16, p.45.
   Nihayat-ul-Muhtaj, article 8, p.307.
   Al-Iqna', article 4, p. 407.

CHAPTER —IV

A Positive Crimes and Negative Crimes

(57) Crimes are divided into two categories according as the manner of the act committed is positive or negative and as the act committed is enjoined or prohibited by the law:—

(1) Positive Crimes and

(2) Negative Crimes.

(1) Positive Crimes:— It constitutes the commitment of a prohibited act such as theft, adultery and drinking.

(2) Negative Crimes:— It constitutes the avoidance of doing something enjoined such as refraining of witnesses from giving evidence, non-payment. Of Crimes most frequently committed are positive. Negative crimes are comparatively infrequent.

(58) Positive crime committed negatively.

Jurists of Islam are agreed that sometimes positive crime is committed negatively. If committed thus, the offender concerned deserves to be punished all the same. For instance, suppose a person detains someone and gives him no food and drink and deprives him of heat that is essential to keep him alive on winter nights, and the victim dies of extreme hunger, thirst or cold. In such a case the person holding him prisoner is a wilful murderer provided that he intends to kill the victim. This is the position held by Imam Malik,[1] Imam Shafi'ee[2] and Imam Ahmed.[3] However, Imam Abu Hanifa does not regard it as homicide on the grounds that the cause of death in such a case is hunger, thirst and cold.[4] But Imam Yousuf and Imam Muhammad declare it as the result

1. *Al-Sharh-ul-Kabeer, lil Durdeer,* Article 4, p.215.
2. *Nihat-ul-Muhtaj,* Article 7 p.239.
3. *Al-Mughni,* Article 9, p. 828.
4. *Badae'-wal-Sanae'* Article 7, P.234.
   Al Bahr-ul-Raiq, Article 8, p. 295.

of wilful homicide for no human being can live without food and drink and minimum degree of heat.[1]

In short, depriving a person of food and drink and heat in extreme hunger, thirst and cold is tantamount to putting him to death.

If a mother does not feed her baby, she will be treated as a wilful killer, although she commits no positive crime.

Imam Malik[2] holds that a person shall be treated as a wilful murderer, who withholds from a thirsty man the water left over by him, being aware of the fact that such an act is unlawful and the man dies of thirst, although the person in question commits no homicide with his own hands.

According to some jurists belonging to the school of Imam Ahmed such an act constitutes suspected wilful crime.[3]

Consider the case of a baby who dies because her naval-string is not bound intentionally. Suppose some women are present when the child is born. One of the women cuts the naval-string but wilfully omits the vital process of binding it and the baby dies consequently. The woman responsible for the omission shall be treated as the murderer of the baby. If it is the intention of all the women present not to bind the naval-string, all of them are likely to be treated as murderers, for what is fatal is not the cutting of the naval-string but the omission thereof. Now if this omission involves the intention of all the women present, the death of the baby may be attributed to them all.

(59) Responsibility of Omission

From an examination of the cases cited by the jurists of Islam, it appears that in every case of omission the person withholding himself from the act involved will not be held responsible for the crime resulting from his inaction. He is amenable to accountability only in cases wherein it is binding upon him according to the Shariah or convention not to omit an act. However, difference arises from this principle with regard to such matters as are enjoined and omission thereof is forbidden. This difference

1. *Al Sharh-ul-Kabeer lil durdeer,* Article 4, p. 215.
2. *Mowahib-ul-Jaleel lil khattab,* Article 6, p. 240
3. *Al-Mughni* Article 9, p. 581.

owes itself to the divergence of positions. For instance, some jurists of the Hambli School hold that when it is possible to save a man from fire, water or beast, but is not saved and is finally killed, the person who would have saved him but did not go to his rescue is not to be held responsible for his death. But other jurists of the same school do hold him responsible. The basis of this difference is the question whether it is obligatory to save him or not. An instance of this is the case of withholding water from the victim as cited above.

(60) The Shari'ah and the modern Laws

The attitude of Islamic jurists towards omission of an act resulting in death is the same as that adopted by the majority of the experts of modern law since the beginning of the 19th Century. Before the 19th century, only a minority of these experts held that an omission may lead to homicide in every sense of the word just as the commission of an act does, since both commission and omission are traceable to man's intention. Later majority of legal experts came to acknowledge that omission might also result in homicide, but with a certain reservation. The condition they laid down in this respect was that the person omitting the act should essentially be bound and that omission of the act was incompatible with his bondage of responsibility. According to these experts it is the same whether the person's responsibility owes itself to the law or mutual agreement. The legal experts illustrate the omission of an act resulting in a crime by citing such instances as to imprison a person without any justification and to deprive him of food with the intention of killing him or failure of a mother to feed her infant with similar intention; while the instance they quote to explain the cases in which no responsibility is involved, include suspension of one's action in going to the rescue of a drowning person or a person engulfed by fire and failing to warn a victim whom a beast is going to attack. In both the cases examples cited are the same as quoted by the jurists of Islam.

(61) Difference between Shariah and Law

The condition laid down by the modern legal experts that the commission of an act whose omission amounts to a crime is

obligatory according to law or mutual agreement is in harmony with the condition laid down by the jurists of Islam that doing of an act whose omission results in a crime should be obligatory according to the Shari'ah, for it enjoins that transactions should be conducted and commitments should be fulfilled:—

"O ye who believe! Fulfil your undertakings." (V:1)

Under this injunction what is obligatory according to an agreement also becomes binding according to Shariah, unless anything contained in the agreement is repugnant to the provisions and the spirit of the Shari'ah. In other words the Shari'ah and the modern law are in agreement on this point.

But the Shari'ah is at variance with modern laws in so far as the former holds a person responsible for the omission of an act which is binding upon him according to custom and from which he abstains. Obviously the scope of Shari'ah in this respect is more logical than that of the modern laws as it is wider; for laws and mutual agreements enjoin all such things as are obligatory according to custom. It would be senseless, indeed, to explain with reference to mutual agreements, what is obligatory according to custom and well-known among the people; for if a person is regarded as responsible in a matter obligatory under mutual agreement, then such matters as are binding according to custom and with which the peopleare familiar are far more obligatory than agreements.

Another point of distraction between the Shari'ah and the modern laws is the fact that the Shari'ah has contained the concept of the criminality of the omission of an act right from the seventh century, whereas it was introduced into the modern laws as late as the nineteenth century. Thus the modern law has only discovered what had long been known in the Shari'ah.

B

CLASSIFICATION OF CRIMES IN ACCORDANCE WITH THE NATURE OF COMMITMENT

Simple Crimes and Habitual Crimes

(62) Crimes are Divided into two categories in accordance with the nature of commitment thereof:—

(I) Simple Crime and (2) Habitual Crime.

(1) Simple Crime:—It constitutes a single unlawful act (such as theft, drinking etc.) regardless of the fact whether it is an occasional act or one being constantly committed. Theft, drinking and the like fall under this category. All simple crimes entail *huds* or *qisas*.

(2) Habitual Crime is that which results from the repeated commitment of an act that is, an act which as such is no crime but assumes the character of a crime when done repeatedly.

Habitual crime is included in penal offences and in order to identify it one has to find out, whether or not, provision declaring the act unlawful, lays down the condition of its being a habit. If it does so, the act constitutes a habitual crime. But if according to the provision of law, only the occurrence of the act is enough to treat it as a crime, then it is a simple crime.

The jurists as a matter of fact agree that punishment is incurred in doing unlawful acts and omitting those mandatory. However, they differ on the question, whether or not punishment is entailed by the commission of an approved act or omission of one disapproved.[1] Some jurists are of the opinion that there is no punishment at all[2] for either. But there are others who hold that

1. An approved act is one desired but not clearly enjoined. Similarly a disapproved act is one the omission or which is required but not clearly enjoined.
2. (a) *Ibn Hazm Al Ahkam lil Usool-ul-Ahkam,* article 3, pp.21-22.
(b) *Al Iqnaa,* article 4, pp. 270-271, *Muwahib-ul-Jaleel,* article 6, p. 320.
(c) *Badae'-wal-Sanae'.* article 7, p. 63.

commission of a disapproved act and omission of an approved one are punishable if circumstances so require.[1]

The persons who believe in punishment for the omission of an approved and commission of a disapproved act,[2] however, lay down the condition that commission or omission is punishable only when it is repeated. If it is not repeated, then it does not as such require any punishment. According to these jurists punishment presupposes the repetition of a disapproved act and of omission of an approved one, since repetition is indicative of the fact that the offender has made it a habit to commit or omit an act of the same nature. They hold that repetition of commission or omission twice becomes a habit.[3] On this view every disapproved act whose commission or approved act whose omission results in the operation of punishment is a habitual crime.

(63) Significance of Classification under Consideration:

The following reasons may be given to drive home the significance of the classification of crime into simple and habitual ones.

First, in view of the operation of the doctrine of limitation. in the case of short term simple crimes, legal action becomes overdue on the very day the crime is committed. However, if the period of crime spreads over a long time, it become overdue right at the time when it is detected. But as regards a habitual crime, prosecution is overdue on the date when the last of the series forming the habit is committed. Second, on grounds of the exclusive jurisdiction of a court. In case of a short term simple crime, the court within whose jurisdiction it is committed has the exclusive power to deal with it. However, if the crime is continuous or recurrent, the power of hearing vests in the court within whose jurisdiction it continues or recurs. In respect of habitual crime only that court is competent to deal with it within whose jurisdiction

1. From the wordings of the statements by some jurists advocating this view one is inclined to think that doing of what is disapproved is definitely punishable. But they do not actually mean this; for punishments, as a rule are governed by public interest. Hence the person in authority is empowered to condone the punishment. Such dogmatic statements should, therefore, he presumed to imply this condition.
2. (a) *Muwahib-ul-Jaleel,* article 6, p. 320.
   (b) *Al-Ahkam-ul-Sultania.* p. 213.
3. *Muwahib-ul-Jaleel* articles 6, p. 320. *Al Ahkam-ul-Sultania,* p. 213.

the last of the acts forming the criminal habit is commited.[1] Third, under the rules of interpenetration. Any verdict passed in the case of a habitual crime bars prosecution in respect of previous acts forming the criminal habit, since the principle of Islamic Shari'ah do not admit of more than one sentence for a number of crimes of similar nature on which no judgement has been passed in past. According to the doctrine of interpenetration only one punishment is sufficient. The modern law experts have also arrived at the same conclusion as the Shariah by considering the merit of a cast' pending in a court of law.

Once a court of law passes verdict against a criminal, reason demands that no legal proceeding is instituted against him unless he commits a similar crime the recurrence of which results in the formation of a habit. What entails punishment is the habit of a forbidden act and not by the act itself taken in isolation. The Egyptian law endorses this view.

(64) The Shariah and the modern laws are in complete agreement with respect to these categories of crime, viz.; simple and habitual crime. Their definitions of them are identical. They also agree that punishment owes itself to habit (and not to any single act). The Egyptian jurisprudence and the law in practice both tend to endorse the view that the commission or omission of an act twice results in a habit.

(65) Crime Resulting From Repetition of Acts.

Sometimes an offender does many acts of similar nature to achieve the same criminal ends. For instance, he steals things from a house piecemeal or beats a man repeatedly. The Shariah enjoins that these successive acts are to be treated as one and the same crime and only a single sentence is to be passed on all them. Thus a thief who steals things from a house in two or more trips shall be deemed to have committed the crime only once.

1. According to French law, if a habitual crime is committed within the jurisdiction of one court and repeated within the jurisdiction of another, then the court within whose jurisdiction the offender resides is competent to hear his case; for only that place may be deemed the scene of crime at which as many acts are committed as are necessary to form a habit. If however this condition is not fulfilled by a given place, it will be deemed to have been fulfilled by the criminal himself and a case may be instituted on the basis of his residence practice both tend to endorse the view that the commission or omission of an act twice results in a habit.

Similarly, if a man strikes another man a number of times, he will be deemed to have struck him only once.

(66) Successive Criminal Act Distinguished from Habitual Acts and Long Term Crime.

Successive criminal acts differ from habitual crimes in that no single act of the series resulting in a habitual crime entails punishment as none of such-acts is a crime in itself, whereas for any of the successive acts punishment may be awarded inasmuch as any one of them can be committed independently of another. For instance if a person intends to steal certain things from a house piecemeal and enters the house with the intention of stealing some of those things and of coming again to collect the rest of them, but fails to return, he shall be deemed to have committed theft as if he had stolen all the things in question.

Successive criminal acts differ from long term crimes in that the crime resulting from such many acts, yet every act is separate and independent whereas long term crime results from the commission or omission of an act which continues for a long time or is committed afresh each time.

(67) The Reason for Treating Successive Acts as a Single Crime.

Acts recurring in succession are deemed a single crime because the principle of Islamic Shari'ah do not admit of more than one punishment for crimes of similar nature. In fact, according to the doctrine of interpenetration, that is the amalgamation of punishments into each other, only one punishment is sufficient. Under the same principle several acts committed to the same criminal end can legitimately be deemed a single crime, since committing of such acts with same intention and to the same end reduces all of them to a single crime.

C

SHORT TERM AND LONG TERM CRIME

(68) The Attitude of Islamic Jurists on short Term and Long Term Crimes.

The jurists of Islam are silent on the two classes of crime under consideration. The reason for this attitude seems to be that the jurists have been focussing their attention exclusively on crimes involving *hudood, qisas* and *diyat*, for such crimes are clearly defined and stem from invariable actions, and the punishments laid down for them are not amenable to change either. Moreover, all such crimes are short term offences; none of them being a long term one. Hence it is needless to differentiate between crimes entailing *hudood* and *qisas* and long term offences.

Penal crimes, however, are both short term and long term ones. But the jurists of Islam have deliberately avoided to lay down the principles governing short term and long term crimes, inasmuch as the Shari'ah empowers the executive organ of the state to identify acts constituting penal crimes. It also confers on the executive the power to prescribe punishments for such crimes. However, the approach of the executive to penal crimes varies with lands and customs. The same act may be declared by the executive of one state as lawful and by that of another as unlawful. Similarly the court of one country may award punishment for an act on grounds other than the court of another country may do so. That is why the jurists of Islam have refrained from discussing penal crimes in detail as they have done in the case of crime involving *hudood*. They have contented themselves with discussing only such injunctions pertaining to penal crimes as are immutable and do not vary with countries and governments. Since we have undertaken to deal with crime in general irrespective of any consideration of its being penal or entailing *hudood* or *qisas* there is no reason why we should not discuss short term and long term crimes.

(69) Short Term and Long Term Crimes

An enquiry into the penal crimes would show that they fall under two categories according to their duration. They are as follows:-

Short term crimes and long term crimes.

Short term crimes constitute those acts, the commission or omission of which is of a short duration. Such a crime takes no more time than the commission or omission thereof. For instance, a crime like larceny is committed when a thief furtively takes away whatever he steals. The crime of drinking synchronizes with the act of the use of liquor. Similarly, the crime of withholding evidence is committed simply by refraining from bearing witness.

Long term crime is that which results from commission or omission of recurrent or constant act and spreads over the entire length of time required for the recurrence or continuity thereof. In the case of such a crime, the end of the act will be deemed its extremity, the point at which the recurrence or continuity thereof comes to an end. Some of the examples of long term crime are illegal detention of a person, nonpayment of *Zakat,* with holding a child from its nurse and non-payment of loan in spite of one's ability to clear it off.

(70) Test of Long Term and Short Term Crimes

Only the provisions of law can tell us which of the crimes is a short term offence and which a long term one; for such provisions define crime, specify its concrete ingredients and thus mark off the categories of crime from one another. If an act happens and ends with the commission or omission thereof, such an act constitutes a short term offence- If, on the other hand, the commission or omission of an act is persistent or recurrent such an act is a long term offence.

It is, however, necessary here to distinguish the continuation of the crime from the continuation of its outcome. Larceny, for instance, is an offence that comes to an end as soon as something valuable is stealthily taken away. Hence this crime is a short term one. But remaining of the thing constantly in possession of

the thief is the continuation of the outcome of theft. Again, drinking is a criminal act which is committed in its entirety, no sooner than liquor is drunk.

"Thus it is a short term offence. But the drunkard's persistent state of intoxication is the continuation of the outcome of this offence and not the continuation of the offence itself. Similarly, causing injury to a person is a short term crime. It is committed by simply injuring the person. But if the offence results in a wound that needs a long term treatment, then it would constitute the continuation of the outcome of the offence.

(71) Long Term Crimes

Long Term Crimes may be sub-divided into two categories

(a) Recurrent crimes and

(b) Unceasing Crimes[1]

Recurrent crime is that offence whose continuation involve volition of the offender. He or she repeatedly intends to commit it. Instances of such a crime are the wilful evasion of the payment of *Zakat,* withholding a child from its nurse and keeping unlicensed arms. In all these cases the offender is guilty of commission or omission of the criminal act, and the criminal act continues as long as he is in possession of the unlicensed arms or keeps avoiding the payment or detaining the child from its nurse. The continuation of such a crime is dependent on the intention of the criminal to possess arms without permission or to avoid payment of Zakat or withhold the child from its nurse.

The continuation of unceasing crime as distinct from the recurrent crime does not involve the volition of the offender. In this case the criminal act persists without the intention of the offender; as for example, digging a well on the road or building

1. We have classified crimes into Short Term crimes and Long Term crimes, and have sub-divided the latter into two categories:
(a) Recurrent Crimes and (b) Unceasing crimes. The legal pundits however, classify crimes into short term crimes and recurrent crimes. These have been further sub-divided into two categories. Under the first category come those crimes that continue because of their recurrence, while under the second are those wherein a single isolated offence constantly continues. We, on our part, have classified them independently notwithstanding their classification by the legal pundits. Since the way we have classified them is deeper and more relevant to our purpose.

a house on an unauthorised plot or infringing Municipal rules in the construction of a building.

(72) Importance of dividing crimes into Long Term and Short Term ones:—

(a) In consideration of Exclusive Jurisdiction of Court

The court exclusively competent to hear the case of a short time offence is the one within whose jurisdiction the act constituting the offence has been committed; for judicial cases are allocated to the courts on the basis of time and place. The court empowered to hear and decide the cases of recurrent offences to the exclusion of unceasing crimes is that within whose jurisdiction such an offence has recurred. It is possible that the offence is committed at several places. In other words the case of a recurrent crime may lie in a number of courts.

(b) In consideration of criminal case becoming overdue

In case of a short term crime the period when a case becomes overdue commences with the commission of a criminal act while in case of a long term crime it begins with the end of the recurrence or continuation of the offence.

(c) In Consideration of the Enforcement of new laws.

Newly framed laws do not apply to offence occurring prior to the enforcement thereof and which recur and continue after the enforcement of these laws.

(d) In consideration of the Effects of a judicial verdict

Decision of Court as to a short term crime shall be deemed pertaining only to the incident brought up before the court. It shall have no bearing on any incidents of similar nature occurring prior to the one pending in the court. This is also true of the incidents occurring thereafter.

However, a case may be instituted in respect of incidents of similar nature following the one about which a *verdict* has been passed by the court. But no case shall lie in respect of similar offences occurring prior to the one decided by the court. The reason for this distinction is that the rule of interpenetration

would apply to offences preceding the case disposed of, and after the application of the above rules it would be improper to institute a case as to previous crimes of similar nature; for punishment aims at correction and admonition. If a punishment serves both these ends, then its repetition would be uncalled for unless the offence is committed afresh.[1]

A verdict passed on prosecution in respect of a long term crime would embrace all previous criminal acts of similar nature irrespective of the fact that no action is brought up as to any of these acts, for all such acts of similar nature constitute a single crime. Hence it would not be proper to institute fresh proceeding in respect of cases not preferred before and pertaining to offences committed prior to the court's verdict. However, if offences of recurrent nature take place subsequent to the Court's verdict, fresh cases may be instituted in respect of them. But it would be improper to prefer a fresh case with respect to an offence of unceasing nature.

(73) Difference between Shariah and Modern Law

The Shariah is in agreement with the modern law as to the classification of crimes into long term and short term offences as well as the outcome of both the categories of offences. But according to the modern law, an act committed prior to the verdict passed by the court is also punishable inasmuch as it treats the case of an act disposed off by the court in isolation from previous crimes of similar nature. The Shariah on the other hand believes in the principle of interpenetration. This principle is still unknown to modern law.

There are, of course, some experts of modern law who have grasped the significance of this principle and have consequently began to advocate it as we shall see in the sequel.

1. See article I.

CHAPTER V

A

CLASSIFICATION OF CRIMES IN ACCORDANCE WITH THEIR NATURE

(74) Crimes against Society and Crimes against individuals

Crimes may be divided into two categories according to their specific nature; viz. (a) crimes against society and (b) crimes against individuals.

A crime against society is that for which punishment is laid in order to suspend collective interests, whether the crime in question affects the individual, the society as a whole or peace and the tranquility of the state. The jurists of Islam hold that punishment for crimes is prescribed as the right of Allah.[1] The term connotes that punishment is intended for the security of the community and the expression "right of Allah" implies that remission, reduction or suspension of punishment so prescribed would be a wrong action.

Crimes against individuals are punishable for the protection of individual's interests, which, of course, is inseparably linked with the interests of the society as a whole.

Crime involving *huds* are reckoned among those offences which are prejudicial to the collective interest, although most of them have bearing on the individual as they are detrimental to his or her interests directly; for instance, larceny or false charge of adultery. Treatment of crimes entailing *huds* as prejudicial to communal interests does not mean that they are not detrimental to the individuals. What is actually meant is that in the treatment of such crimes collective interest is given preference to individual

1. *Bada-wal-Sanae'*, article 7, P 33
Fath-ul-Qadeer, article 4, P 12.

interest. Hence if an individual decides to forgive such a crime, his decision would not affect either the crime or its punishment.

On the other hand, offences involving *qisas* or *diyat* are committed against individuals. But they are detrimental to the society as well. However, in the case of such crimes the right of the individual is given preference to the right of the society. Hence the individual has the right to remit the punishment thereof inasmuch as the crime directly relates to him. Nevertheless, his or her pardon of the offender will not be helpful in letting off the offender. He will be awarded penal punishment in order to safeguard collective interests against the harm his criminal act may do to them indirectly

Some of the penal crimes are detrimental to the interest of the community as a whole while others are harmful to the individual interest (the term community has already been explained).

As a matter of fact a crime prejudicial to the communal interest will, in the final analysis, be detrimental to the individual interest, and one prejudicial to the individual interest will ultimately be detrimental to the common weal as well even if such a crime constitutes the violation of individual right. Hence a jurist of Islam observes that "Every right of man involves the right of Allah; for it is the right of Allah that anyone bound by responsibility should abstain from causing injury to another man."[1]

However, a crime declared by the Shariah as prejudicial to the communal interest is one that is more detrimental to the community than to the individual and the other way about.

1. *Sharh-ul-Zarqui, Al Mukhtasar-ul-Khaleel*, article 8, P 115.

B

HABITUAL CRIMES AND POLITICAL CRIMES

(VIZ:Rebellion)

(75) Habitual crimes and political crimes distinguished

The Islamic Shariah has drawn a line of distinction between habitual crimes and rebellion (political crimes) ever since it has come into being. It has done so by taking into consideration the communal interest, social security, public peace and the safeguard and survival of the national fabric. That is the reason why every offence politically motivated is not treated by the Shariah as a political crime; whereas habitual crimes committed under the impact of political conditions are treated as political crimes.

There is no specific difference between political and habitual crimes. In fact the two kinds of crimes bear close affinity in so far as their nature, occurrence and the means of their commitment are concerned. The only difference between the two is that their motives are dissimilar. The purpose of political crimes, for instance, is either the achievement of certain political ends or their motives are political. The motives of habitual crimes, on the other hand, are of non-political or habitual nature. It is possible that political factors may lead to the occurrence of habitual crimes. This means that habitual crimes often get mixed up with political offences. This necessitates differentiation between the two kinds of crimes.

(76) When does Political Crime Occur?

A political crime does not take place in normal conditions. Hence any crime committed in such conditions shall be treated as a habitual one, whatever the motive or grounds thereof. For instance if a person murders a head of the state, his offence shall be treated as a habitual crime even if the murderer himself is a political figure, provided that the conditions obtaining at the moment are normal. Abdur Rahman Ibn Muljum, for example, assassinated the Caliph Hazrat Ali Ibn Abi Talib (R.A.A.) on political grounds. The assassin was a Kharji.[1] Nevertheless, his crime was treated as a habitual offence. Hazrat Ali (R.A.A.) himself was of the same view and the Ulema subsequently subscribed to it. The Caliph summoned his son Hazrat Hasan (R.A.A.) and asked him to deal with the culprit in the following manner.

> "Imprison him. If I survive, I shall exercise my right to deal with him as I choose. But if I die, injure him in the same manner as he has injured me."

Political crimes are phenomena occurring in extra ordinary conditions. As a matter of fact they are confined to revolutionary conditions or a state of civil war. If the people rise in rebellion against the state or fighting erupts between the State and rebels and the conditions determined for a strife between the parties, a political murder may result. If these conditions are not fulfilled or if they are present but no rebellion or internecine strife results, then crimes taking place in such circumstances, shall be deemed habitual rather than political crimes.

(77) Political Offenders

The jurists of Islam use the term 'rebellion' for political crime and rebels or group of rebels for political offenders.

The jurists define a group of rebels as a group of dignitaries possessing power, which rises in rebellion against the established authority of the Imamum (the competent authority) on some agreeable plea or one that opposes the Caliph or the Grand Imam (The supreme authority of the Islamic State) or his viceroy on two grounds:-

(a) that the group in question is not willing to fulfil a duty enjoined by Islam like the payment of poor due or it does not comply with the injunctions of Shariah pertaining to Allah or man[2] and (b) that the group so defined acknowledges the authority of the Imam (that is the group accepts it by word of mouth and

1. The Kharjis constituted a political group of Muslims in the early period of Islamic history, which was opposed to Hazrat Ali (R.A.A.) as it did not consider him fit for caliphate.
2. Injunctions pertaining to Allah refer to those which relate to the safeguard of social interest and injunction pertaining to man refer to those which aim at the protection of individual interests.

by formally pledging obedience to the Imam in the latter's presence, duly performing the act of bai'at, or in his absence by calling to witness some responsible functionary of the State) and yet does not deem the Imam to be of any consequence or consider it necessary to recognise his authority, notwithstanding the fact that 'bai'at' or formal pledge of obedience has been stressed by the Holy Prophet (S.A.W.) in the following words:-

"Who dies without the yoke of Bai'at dies in a state of ignorance."

The second grounds of rebellion also include opposition to Imam with a view to depose him[1], whereas it is unlawful to oust an Imam even if he is a tyran.[2]

The revolting group is termed by the jurists as rebel, and the other party as the people of justice (that is, the law-abiding party).

(78) Conditions governing the determination of political criminals or rebels.

From the foregoing discussion and the definition offered by the jurists, we are in a position to infer and briefly state the conditions that must be present in the conduct of a criminal to treat him as a political offender or a rebel.

1. The practice according to all the four schools of Islamic jurisprudence has been that the Imam cannot be deposed in spite of his transgression, iniquity and usurpation of people's rights, nor rebellion to replace him can be justified; for uprising against established authority, if allowed, will give rise to agitation, commissions and frequent revolutions, throwing the public affairs into a sad disarray. A minority of the jurists, however, holds the Ummah is within its rights to depose the Imam or the competent authority on cogent gzaundo and that if he is guilty of transgression and iniquity, and encroaches on the rights of the people, he stands deposed. They also maintain that if the presence of the Imam causes disorder and engenders despondency in the sphere of religion the Ummah has the right to oust the Imam as it has the right to appoint him for the management and conduct of its affairs. If the removal of an aberrant Imam results in agitation, his replacement would be a lesser evil than his retention. That is the reason why the jurists say that the removal of the Imam is justified on the condition that no agitation or turmoil is feared. Imam Malik is reported to have said that if anyone agitates to dislodge a righteous Caliph like Hazrat Umar b. Abdul Aziz, he should be resisted, and the people should rally round the Caliph. But in case of some other Imam unlike him, the insurgent should be left to have his way. For, Allah revenges the wrong done by one tyrant through another. (*See Sarah-ul-Zurqani* Vol. 8, P. 60. Footnote by Ibn Abideen, Vol. 3, P 42. *Ahkam-ul-Sultania* P. 14. Also see Al Iqna' Vol.4, P. 292).
2. *Sharh-ul-Zurqani, Al Mukhtasar-ul-Khaleel,* Vol. 8, P. 60,

First Purpose of Crime

One of the essential conditions of a political offence is that it aims at the deposition of the head of the State, and the dissolution of legislature or direct definance of the competent authority the head of the State. If this ingredient is present in an offence together with other conditions, it constitutes a political crime, and the person guilty of it is a rebel. But if the purpose of the offence is to bring about a change inconsistent with the provisions of the Shariah and to pave the way for a system repugnant to Islamic Order or to provide an opportunity to a foreign power to occupy one's homeland or weaken one's own country vis-a-vis foreign countries, the offence in question will not be treated as rebellion or political crime. Such criminal acts would be tantamount to the creation of chaos on earth and to a war against Allah and His Prophet (S.A.W.). However, they are actually regarded as habitual crimes, and severe punishment has been laid down for them.[1]

Second, Rationalization

Another test of rebels or political offenders is that they try to rationalize their position by advancing arguments in their favour and justify their opposition to the established authority and offer reasons that may seemingly warrant their demand, although the arguments or reasons they put forth may, in themselves, be absurd and untenable. For instance, the insurgents who agitated against the rightly guided Caliph Hazrat Ali (R.A.A.) argued that the Caliph was aware of those who assassinated his predecessor Hazrat Usman (R.A.A.), and in spite of being in control of the insurgents condoned their guilt instead of imposing *quisas* on them. Take another example: during the caliphate of Hazrat Abu Bakr (R.A.A.) the people who refused to pay the poor-due pleaded that they would pay it to the man whose prayer would soothe their hearts and cited the following verse of the Holy Quran to substantiate their standpoint:—

1. *Asna-al-Matalib,* Vol.4, PP.113-112
   Al Mughni, Vol. P.52.
   Nihayat-ul-Muhtah, Vol-7, P. 382
   Al-Bahr-ul-Raiq, Vol. 5, P. 151.

"Take alms of their wealth wherewith thou mayst purify them and mayst make them grow and pray for them. Lo! Thy prayer is an assuagement for them." (IX:103)

If the insurgents do not account for their agitation or give a reason which the Shariah does not admit of, such as demanding the removal of the head of the State without any grounds whatsoever or simply because he does not happen to be their countryman, then such people are no better than bandits causing turmoil on earth. There is a fixed and permanent punishment prescribed for them. But they do not fall under the category of rebels or political offenders.

Third, Source of Power and Grandeur:

One more test of a rebel or political offender is that his power and grandeur does not originate from his personal capacity, but owes itself to his followers and supporters. If it does not spring from the followers and the supporters, then he will not be treated as a political offender, whatever arguments he may advance to prove himself as such.

Fourth Revolution and War

A fourth condition of political offence or rebellion is that it takes place in a revolution or in a state of civil war brought about for the achievement of the purpose of the offence. If no revolution or state of civil war exists when the offence is committed, it does not amount to a political crime or rebellion but a habitual crime entailing the prescribed punishment for a habitual crime. This was the policy followed by Hazrat Ali (R.A.A.) towards the Khawrjis. During his caliphate the Khawrjis refused to obey him and raised the slogan "None but Allah's Command is acceptable!" The Caliph said, "Verily this is an unquestionable precept, but it has been turned into a slogan for an evil purpose. You enjoy three rights which we must respect:—

(a) We will not prevent you from worshipping in mosques

(b) We will not be the first to start a war against you and

(c) So long as you remain with us and do not revolt against our authority, we will not deprive you of...?

(79) The Rights of Rebels and their Responsibility prior to Revolution

The rebels have the right to propagate their ideas within lawful limits. They are also at liberty to utter whatever they like consistent with the provisions of the Shariah. On the other hand, it is incumbent on the law abiding citizens to repudiate their professions and point out the fallacies of their position. Anyone of the rival groups namely the rebels and the law abiding citizens infringes the provisions of the Shariah in the course of propagating its ideas shall incur punishment prescribed for a habitual offender. If either group, for instance, levels, false charges, he shall be subjected to relevant 'hud'. If it uses obscene language, it incurs penal punishment and if any member of the rebel group is found guilty of a crime, he shall be awarded punishment laid down for a habitual offender.

The rebels have the right of association hence if they assemble at an appointed place, nobody is authorised to take action against them unless they fail to fulfil any objection or relinquish obedience of the Imam. This was also the precedent set by Hazrat Ali (R.A.A.). When a group of kharjis deserted him and gathered together at Nehrwan, the Caliph sent his official to rule over them. They obeyed the Caliph's agent and the latter, in his turn, overlooked their acts of lawlessness. This went on for a long time till the rebels murdered him. Thereupon Hazrat Ali (R.A.A.) ordered them to hand over the assassin. The rebels refused to comply and argued that all of them were guilty of the officials' murder. Thus they renounced allegiance to the Caliph and resorted to open disobedience. Hazrat Ali consequently waged a war against them.[2] The three Imam Malik, Shafiee and Ahmed lay it down that no

1. (a) *Al Ahkam-ul-Sultania,* P.58.
   (b) *Al-Mughani,* Vol. 10 P. 60.
   (c) *Asna-al-Matalib* Vol. 4, P.112-113
   (d) *Nihayat-ul-Muhtaj* Vol. 7, P. 386.
2. (a) *Al-Ahkam-ul-Sultania,* P. 48.
   (b) *Al-Bahr-ul-Raiq,* Vol. 5, P. 152.
   (c) *Al-Mughni,* Vol. 10. PP. 53 & 58.
   (d) *Nihayatul-Muhtaj,* Vol. 4, P. 383

armed action shall be initiated against the rebels unless they are first to start fighting law abiding citizens. Once they do so, military operation against them shall become lawful. However, Imam Abu Hanifa holds that their concentration and disobedience of the Imam shah suffice to warrant military action against them.[1]

(80) Rights and Responsibilities of Rebels During and After Revolution

Once a revolution sets in and the civil war flares up, it becomes incumbent upon the head of the State to wage a war against the rebels in order to subjugate them, but such an operation should not be undertaken to kill or exterminate them. Moreover, the head of State is required to fight only those rebels who come out to combat his forces, taking care at the same time, to spare those who are driven away or who withdraw. Again, the wounded and the captives should not be killed.[2] Those should also be spared who lay down arms.

Such people should not be deprived of their belongings; nor should their womenfolk and children be captured; for the Holy Prophet said that all such acts are prohibited in an Islamic State.

On the cessation of hostilities and cooling down of vindictive passion on either side, the head of the state is under the obligation to ensure the restoration of whatever property of the rebels is in possession of the law abiding citizens. If anything belonging to the rebels has been destroyed after the cessation of hostilities the person responsible for the loss thereof must be made to pay indemnity for it. On the contrary, the property destroyed by the rebels during the wars to be treated as wasted. But if the rebels

1. *Sharh Fath-ul-Qadeer*, Vol. 4, P. 411.
2. (a) However, Imam Abu Hanifa is of the view that should expediency demand, the captives must be killed too, while other Imams do not approve of killing the captives. *Al Bahrul Raiq*, Vol. 5, P. 153.
   (b) *Al Ahkamul Sultania*, P. 49.
   (c) *Al Bahr-ul-Raiq*, vol. 5, PP. 152-153.
   (d) *Al Mughni*, Vol. 10, P. 63.
   (e) *Bihayat-ul-Muhtaj*, Vol. 7, PP. 386-387.
   (f) *Sharh-ul-Zarqani*, Vol. 4, PP. 1-62.
   (g) *Tabsarat-ul-Ahkam*, Vol. 2, P. 249.
   (h) *Asna-al-Matalib*, Vol. 4, P. 114.

have damaged or destroyed any property of the law-abiding citizens subsequent to the cessation of the state of war, they will be held responsible for such a loss, and will be required to pay indemnity for it. This, of course is the most correct position.

But as opposed to this view, some jurists hold that they shall have to pay indemnity for the entire loss. The arguments they advance in support of this is that any right and any indemnity incurred is not nullified by a sinful act.

The first argument advanced by the former group of jurists is that during the tumultuous period of Hazrat Ali (R.A.A.) and Hazrat Muavia's, Caliphate the companions of the Holy Prophet (S.A.W.) arrived at the consensus that a person who does an unlawful act by justifying it on the basis of some Quranic injunctions should not be awarded any punishment; nor should be deemed to have incurred indemnity for anything he might have destroyed by justifying his act on a similar plea. In the second place, these jurists argue that the rebellious party is engaged in fighting on an agreeable plea, the losses they might inflict on the law abiding citizens will not entail any indemnity in the same way, as these citizens will not pay any indemnity for things belonging to the rebels, which they may destroy. In the third place, the jurists in question argue that if indemnity is imposed on the rebels, they will be disgusted and will not submit again[1] to the competent authority. Although the losses caused by the rebels both in life and property during the revolution will not be accountable, yet the head of the State will be empowered not to forgive their offences. He may, in the public interest, award the statutory punishment for disobedience or breaking the law. But the three Imams Malik, Shafi'ee and Ahmed say that the punishment so awarded should not be death sentence. They argue that since the execution of the captives and the wounded is impermissible, condemnation to death of those insurgents who surrender and

1. a) *Nihayat-ul-Muhtaj*, Vol.7, PP.386-387.
   b) *Al Bahr-ul-Raiq*, Vol.5, P.153.
   c) *Sharh-ul-Zurqani*, Vol.8, PP.61-62.
   d) *Al Ahkam-ul-Sultania*, P.50
   e) *Asna-al-Matalib* Vol.5, P 114.
   f) *Al Mughni*, Vol.10, PP 60-61.
   g) *Al-Sharh-ul-Kabir*, Vol.10. pp.61-62.

submit is unlawful as well. Imam Abu Hanifa, on the contrary, deems it lawful to execute a prisoner in the public interest. He also declares that it is permissible to kill the rebels after overcoming them; for he surmises that the execution of the rebel would be tantamount to penal punishment. At any rate, the judge enjoys extensive powers is respect of penal punishments. He may choose any of the numerous punishments that the law provides for, just as the Head of the State is empowered to remit any punishment either in part or as a whole.

(81) Punishment of Rebels and Political Offenders as Prescribed in the Shariah.

From what has been stated above it is clear that the punishment of rebels vary with circumstances. So the offences they commit prior to the beginning of a revolution or the outbreak of a civil war entail punishments laid own for habitual crimes, inasmuch as such offences in the absence of revolutionary conditions or a state of civil war would remain habitual crimes. On the other hand, offences committed during a revolution or civil war or necessitated by the constitute political crimes and the Islamic Shariah declares it permissible to kill the rebels, repulse and subjugate them and seize their property to the extent it is deemed necessary. Such offences include interference with Government servants in the due discharge of their duties and their murder, taking over the control of the country and its affairs, destruction of roads and bridges, setting on fire military positions and bases, demolition of fortifications, destruction of the dumps of arms, ammunitions and other essential military supplies. But when the state gets full control over the rebels and the latter lay down arms, the security of their lives and property shall be ensured and the head of the State shall be under the obligation to pardon them and punish them for the crime of rebellion itself rather than punishing them for the offences committed during insurgency.

Hitherto we have been dealing with the injunction relating to offences committed in a state of war or revolution and also those necessitated by the nature of war and revolutions. There are, on the other hand, crimes committed by the rebels during a war or revolution which war or revolutionary conditions do not

necessitate. Such crimes are habitual and the punishments to be awarded for them shall be those prescribed for habitual offences, notwithstanding the fact that they are committed during the war or revolution. These offences include drinking of liquor, adultery, killing one's own comrade in revolution or stealing anything belonging to him.[1]

(82) Difference Between Islamic Shariah and Modern Law

Before the French Revolution the Modern Law looked upon political crime as more dangerous than a crime of moral nature. The treatment meted out to the political offenders was repugnant to the basic principles of justice. They were awarded the most severe punishment. Not only was their property confiscated but also their dependants were apprehended and deprived of rights which the moral offenders were not denied. In the wake of the French Revolution, however, the outlook of modern law underwent a change. Owing to the series of revolutions that set in and the various changes coming about in political systems, the attitude of law towards political criminals softened. It mitigated their punishments and provided for lighter sentences.

The scholars of modern law differ on the grounds of distinction between moral and political offences. According to one group of these scholars, the criterion of distinction is the purpose of offence. If the purpose is political, the offence is a political one; or else it falls under the category of moral crimes. This view has been subjected to criticism on the ground that it regards the cause of offence as a decisive factor in determining the nature of offence, thereby providing the murderers and the thieves to take advantage of overt circumstances, which they have no right to profit by. Another group of legal pundits hold that the determination of the nature of offence depends on the kind of right infringed by it and that the cause of crime has nothing to do with it. On this view only the act committed against the State and the system of government shall be treated as an offence. The objection raised to this position is that crimes which

1. We have confined ourselves here to a discussion of rebellion or political crime only with a view to bringing out the difference between such a crime and moral offence as well as elucidating the fundamental elements of such a crime. Relevant details will, therefore, be dealt with in Vol.11 where we would discuss rebellion as a specific crime.

are political beyond a shadow of doubt and which relate to a civil war or revolution have been turned into moral offences.

(3) There is yet a third group of modern legal pundit which differentiates between offences committed in a state of civil war or revolution and those committed in normal circumstances hence they hold that crimes committed in normal conditions are moral, even if they are politically motivated. As distinct from these offences, crimes taking place during a civil war or in revolutionary conditions and also directly relating to such a state of affairs, constituting at the same time such acts as are justified in organized warfare are political offences. This position has been endorsed by the international organisation of law.

A recent trend of modern law is that it treats crimes committed against social system such as communist or anarchical activity as moral offences just as it looks upon all crimes relating to the independence of the state as moral ones; for they pertain to one's homeland and not to the government or the rulers. The international organisation of law upheld this position in 1982 giving the verdict that criminal acts committed against a social system shall not be deemed as political offences after the confession of the offender.[1]

(4) From what has been stated above it is clear that according to the latest position a political crime is that which is committed against the internal administrative set up and the authorities running it (and not the crimes committed against the state or have bearing on the independence and foreign relations thereof). It is also essential that such a crime is not only committed during a revolution or civil war but is also in harmony with the spirit of the situation.

(5) All the matters discussed above accord with the provisions laid down by the Islamic Shariah fourteen hundred years ago. There is no difference between the Islamic Law and the modern laws in this respect, except that the former has led the van in the delimitation of moral and political crimes and that the modern laws are simply following the Shariah and benefiting from the principles thereof.

1. a) *Al Mausoo-atul-Janaiyah,* Vol.2, PP.47-53.
   b) *Sharh Qanoon-ul-Uqooba* by Kamil
   c) *Kamil Mursy and Saeed Mustafa* PP. 89-95
   d) *Al Qanoon-ul-Janai, Ali Badwi,* PP 76-88.
   e) *Al-Qanoon-ul-Janai, Ahmed Safwat,.* PP 73-76.

PART II

CHAPTER 1

Fundamental Elements of Crime

(83) The Ingredients of Crime

In the course of defining crime we have stated that crimes actually comprise such acts as Allah has forbidden and laid down *hud* or punishment for it. Those forbidden acts are:(a) Commission of a prohibited act and (b) Omission of an act enjoined. These forbidden acts have been called the injunctions of Shariah. Besides it is necessary to prescribe punishment for it, inasmuch as merely doing of an act or refraining therefrom does not in itself constitute a crime.

Since mandates and prohibitions are legal obligations, they are addressed to a mature and, rational person with a sense of responsibility; for making an injunction binding on a person implies that he is being addressed to. Addressing anything devoid of reason and understanding is meaningless. For instance animals and inanimate objects cannot be addressed to. Similarly a person who is able to understand what is addressed to him but is incapable of grasping it in detail and of distinguishing between commands and taboos as well as matters pertaining to reward and punishment is not prone to address and is hardly any different from plants and animals in this respect. A lunatic or a child cannot be bound by obligations, since obligation presupposes the capability of grasping what is actually addressed to and understanding it in detail.

It may be inferred from the foregoing discussion that there are three fundamental elements of crimes:—

(1) An explicit provision for prohibiting an act constituting crime and specifying punishment thereof. In modern legal terminology this is known as the legal element of crime.

(2) Doing of an act, the commission or omission of which goes to make up an offence. In modern terminology this is known as the substantial element of crime.

(3) Maturity, responsibility and accountability of the offender. In modern legal terminology this is known as the cultural element of crime.

An act is a crime only when all these essential elements are present. Besides every crime must contain its distinct ingredients making it possible to award the respective punishment prescribed. For instance, larceny consists of taking away something stealthily or adultery comprises the act of sexual intercourse. In addition, certain other specific elements too, must be present to characterizes an act as a crime of specific nature.

The difference between fundamental and specific elements of a crime is that the former are to be found in all the crimes alike, while the specific ingredients vary with the nature of different offences. The jurists of Islam have adopted the method of discussing the general and specific aspects of crime at a stretch. But we have followed here the procedure of Modern Law. Thus the fundamental elements will be dealt with in a general discussion of criminal law, while the specific elements will be taken up while discussing specific criminal laws respectively.

A

CHAPTER II

THE LEGAL ELEMENT OF CRIME

(84) In order to treat an act as a crime, the existence of a provision in the Shariah is essential declaring the act in question unlawful as well as prescribing punishment for it. This is what we term today as the legal element of crime.

But mere provision declaring an act unlawful and laying down penalty for it is not enough to award punishment for any act, at any place, at any time and to any person. To award punishment for a forbidden act also requires that the relevant provision is in force at the time and place of the commitment of crime and is also applicable to the person guilty of it. If any of these conditions is absent, the punishment will not be operative.

In discussing the legal element of crime, we have to deal with the following three topics, which we propose to take up in separate sections

(1) Provisions relating to crimes and punishment viz. the criminal provisions of Islamic Shariah.
(2) Application of the said provisions to time,
(3) Applications of those provisions to place and
(4) Application of them to persons

SECTION I

PROVISIONS RELATING TO CRIMES AND PUNISHMENTS

OR

CRIMINAL PROVISIONS OF ISLAMIC SHARIAH

(85) A discussion of the criminal laws of Islamic Shariah calls for a consideration of following matters:—

(1) Their bearings on provisions and on crimes and punishments.

(2) The sources of Islamic Criminal laws.

(3) Interpretation of criminal provisions.

(4) Discrepancies, suspension and invalidation of provisions.

(5) The interrelation of the provisions of Shariah and the provisions of law.

We now proceed to discuss these questions separately

A - The Criminal Provisions of the Shariah and Their Bearings upon crime and punishment.

(86) Prelude

The jurists of Islam divide the provisions of Shariah into two categories:-

(1) Obligatory Provisions and

(2) Deterministic Provisions

An obligatory provision is one wherein the obligated or responsible person is asked to do an act or refrain therefrom or allowed the option of commission and omission. This category of provision is so called because it makes the doing of an act obligatory. The provision contained in the following verse of the Holy Quran belongs to this category:—

"Lo! Allah commandeth you that ye restore deposits to their owners and, if ye judge between mankind that ye judge justly." (4:58)

Or the obligated person is enjoined to refrain from doing an act, as Allah says:—

"And do not kill anyone whom Allah has forbidden, except for a just cause." (17:33)

Again, Allah commands:—

"And come not unto adultery." (17:32)

Or the person under the obligation is given the option of commission or omission:—

"But when you have left the sacred territory, then go hunting, if ye will." (5:2)

At another place it has been enjoined that:—

"Whoso is slain wrongfully we have given power unto his heir." (17:33)

A deterministic provision, as distinct from an obligatory provision, implies causation condition or obstruction. Such a provision is termed as deterministic in-as-much as it is required, in the first place, to attribute effects to their causes. The following verse of the Holy Quran may be cited as an example

"As for the thief, both male and female, cut off their hands." (5:38)

At another place it has been laid down that:—

"The adulterer and the adulteress, scourage ye each one of them with a hundred stripes." (24:2)

Here in the first verse larceny has been described as the cause of the amputation of hand, while in the second verse the act of scourging has been attributed to larceny.

Secondly, a deterministic provision is required to lay down conditions for certain matters, as Allah says:-

"Why did they not produce four witnesses? Since they produce not witnesses, they verily are liars in the sight of Allah." (14:13)

This is the injunction of four witnesses as a condition for the proof of adultery. The prophet's tradition may also be quoted in this context:—

"Stealing of only a fourth of Dinar warrants amputation of hand."

This saying lays down condition for amputation of the thief's hand; that is, the value of a stolen thing should be equal to or more than a fourth of Dinar.

Thirdly the deterministic provision should specify the obstacles to its operation, as has been indicated in this Tradition:

"The murderer is not entitled to inheritance."

This tradition imposes a ban on murderer's becoming the heir of his victim.[1]

There are two grounds of difference between an obligatory provision and deterministic provision. The first ground is that the obligatory provision is designed to require commission or omission of an act or to allow choice between commission or omission; but this is not so in the cause of deterministic provision. In fact, deterministic provision is designed to state causes, conditions and obstacles.

The second ground of difference between the two kinds of provisions is that action under an obligatory provision is dependent on the choice of the agent under obligation. He may or may not act thereupon; whereas the deterministic provision sometimes depends on the choice of the agent and sometimes it does not.

It must also be borne in mind that the same injunction sometimes contains both the obligatory and deterministic provisions simultaneously.

The following verse of the Holy Quran provides an example of such a provision:-

"As for the thief, both male and female, cut off their hands." (5:38)

This injunction constitutes an obligatory provision on the one hand that is a command not to steal and a deterministic provision on the other, that is attribution of the amputation of hand to stealing.

Obligatory provisions about crimes under consideration are those which enjoin or prohibit an act. Other provisions of this category which involve choice are not relevant to this discussion,

1. *Al-Ahkam fil Usool-ul-Ahkam lil Aamadi* Vol. 1, P.181.
Al Mustasfa lil Ghazali Vol. 1, P.93.
Usool-ul-Fiqh A. Wahab Khallaq P.74.

inasmuch as to act or not to act upon them does not entail punishment and either course of action taken in accordance with a commendable decision is no crime at all.

But those injunctions contained in deterministic provisions which pertain to punishments are important for our discussion since they specify causes, conditions or obstacles as the case may be.

(87) The Basic Rules of Islamic Shariah

One of the fundamental rules of the Shariah is that "unless relevant provision exists, no judgement can be passed on the actions of a sensible person."

This means that the actions of a responsible person cannot be regarded as illegitimate unless a provision of Shariah in respect of its illegitimacy is quoted; or unless a relevant provision exist, a responsible person shall not be bound to do or not do an act.

Another fundamental rule is that "things and actions are legitimate in themselves."

This means that any act or omission of an act is basically justified and unless a provision forbidding such a course of action exists, the agent cannot be taken to account for it.

Both the foregoing rules imply one and the same thing,[1] that is, an act or omission on an act cannot be treated as a crime, unless it is explicitly provided for otherwise. If a provision enjoining an act or omission of an act does not exist, such a course of

1. Most of the jurists belonging to the Hanafi and Shafi'ee schools have adopted the second rule while the first rule has been accepted by those who hold that justification or lawfulness presupposes a justifier and the justifier is Allah. Who, by His address, allows the choice between commission and omission. In the absence of address, however, the question of choice and justification does not arise. Hence all the acts not provided for are neither forbidden nor justified, and there is no harm in doing or omitting them unless a provision exists or enflamed to prohibit or enjoin them. There is yet another group which accepts the first rule on the ground that legitimacy means that there is no harm in doing a legitimate act.
This very difference has actually given rise to the two fundamental rules. The reader is referred to following words for further study.
a) *Al Ahkam Fi Usool-lil-Ahkam Aamadi* Vol. 1 P. 63.
b) *Al Mustasfa-lil-Ghazali* Vol.1, P.63.
c) *Musallim-ul-Suboot*, Vol. 1, P.49.
d) *Al Ahkam-fi-Usool-il-Ahkam*, Ibn Hazam, Vol. I, P.52.
e) *Usool-il-Fiqh* by A. Wahab Khallaq, P.173.

action is not accountable for. Again, since according to Shariah forbidden acts do not constitute crimes merely on grounds of prohibition alone, they assume the character of crimes when punishment is also laid down (whether it is a *hud* or other punishment), it is clear that no action would be tantamount to crime under the Shariah unless a provision exists forbidding it as well as prescribing punishment for it.

There is yet a third basic principle of the Shariah which runs as follows:—

> "A person legally under obligation is one who is able to understand the reason for being so. He is also capable of being under obligation in respect of whatever is declared obligatory. Again, according to Shariah a person is deemed to be under obligation and the person in question knows so much about it that he can be prevailed upon to carry out this injunction."

The foregoing rule lays down the essential conditions required to be present in person under obligation or responsible as well as those of an act which he is under obligation to perform.

The first condition of being bound by responsibility is the ability to understand the reason for responsibility, that is the person responsible should be capable of understanding those provisions of Shariah which relate to an obligatory injunction.[1]

The second condition is that the person under obligation is capable of bearing responsibility for the obligatory act and liable to punishment for his failure to bear the responsibility.

The conditions prescribed for an obligatory act are as under

(1) The act must be possible, for no one can be held responsible for an impossible act.

(2) Commission or omission thereof must be in the power of the obligated person. If it is beyond his power, he cannot be held responsible for it.

(3) The above two conditions being present, the person doing the act should have adequate knowledge thereof so that 'he may be prevailed upon to do it.

Such an adequate knowledge comprises the following elements:—

(a) It covers knowledge of obligatory injunctions. These

injunctions can only be known when a provision pertaining thereto exists and is publicized; for a person ignorant of what is enjoined or prohibited is incapable of acting accordingly. Application of this rule to crimes implies that an act should not be treated as a crime unless the provision relating thereto is given proper publicity.

(b) It also includes such matter as must induce the person under obligation to perform the obligatory act as well as dissuade him from disobedience. This is possible only when the person in question knows that he is liable to punishment for disobedience. Application of this condition to crimes means that the provision pertaining to crime presupposes a penal provision. From this as from the first two rules it is clear that no sentence can be passed in the absence of a relevant provision.

(88) The sources of foregoing Fundamental Rules.

The rules mentioned above purporting that under the Islamic Shariah an act cannot be treated as a crime nor can any punishment be awarded for it unless a provision is brought to bear upon it, do not owe their origin either to reason or logical argumentation or to the genera] injunctions that enjoin justice and fair play and forbid injustice and oppression. They are rather supported by specific and explicit provisions. The following verses of the Holy Quran may be cited as examples of these provisions:

> "We never punish until we have sent a messenger." (17:15)
>
> "And never did thy Lord destroy the townships till He had raised in their mother (town) a messenger reciting unto them Our revelations." (28:59)
>
> "In order that mankind might have no argument against Allah after (the coming of) messengers" (5:165)
>
> "That with it I may warn you and whomsoever it reaches." (6:19)
>
> "Allah does not impose upon any soul a duty but to the extent of its ability." (2:286)
>
> "Say to those who disbelieve if they desist, that which is past shall be forgiven to them." (8:38)

The injunctions cited above unquestionably provide that an act is to be deemed a crime only when it has been specified as a crime. Similarly a punishment can be awarded only when the people have been warned against it before hand. Allah awards punishment only after explaining his commandments and warning against the wages of sin and that a person is held responsible in proportion to his capacity.

(89) Historical Background of the Fundamental Rule that Crime and Punishment pre-suppose Legal Provision.

This principle has existed in the Islamic Shariah for thirteen hundred years ever since the revelation of the Quranic injunctions. That is why the Shariah is different from the modern law. It has been introduced in the modern law only after the eighteenth century. It was incorporated in the French Law in the wake of the French Revolution and was first included in the declaration of Human Rights in 1789. Later on, it found its way into other modern laws.

(90) Procedure of Application of Above Rule under the Shariah.

It has already been emphasized that under the Shariah no act can be regarded as a crime and no punishment can be awarded for it unless and until it is so provided for. We have cited those Quranic injunctions wherein this principle has been laid down and have also stated at the same time the rules framed for the application thereof. Although the Shariah requires that this principle is to be applied to all the crimes yet it has not laid down a uniform procedure of its application. The procedure varies with various crimes such as those entailing *hudood, qisas* and *diyat* and penal punishments

Let us now proceed to examine the way the Shariah makes it applicable to various crimes

(1) In cases involving *Hudood* there can be no crime and no punishment without provision.

(91) Impact of the Above Rule on Crime involving *Huds*

The rule that there can be no crime and punishment in cases entailing *huds* unless it is so provided for has been applied

by the Islamic Shariah in a most subtle manner. This becomes crystal clear when one sets about a search for provisions and examines them carefully.

Crime involving *hudood* are seven:

(1) Adultery
(2) False Accusation of Adultery
(3) Use of Liquor
(4) Larceny
(5) Murder, Subversion and plunder
(6) Apostasy and
(7) Rebellion.

The divine injunction regarding adultery is as follows

"And come not near unto adultery." (17:32)

"The adulterer and the adulteress, scourge ye each one of them with a hundred stripes." (24:2)

And the Holy' Prophet commands:—

"Record this injunction from me that according to the divine verdict punishment for an unmarried couple is a hundred stripes together with expulsion from homeland and punishment for a married couple is a hundred stripes as well as stoning."

These in short are the punishments prescribed by the Shariah for the offence of adultery.

The divine injunctions as to the false accusation of adultery runs as follows:—

"And those who accuse honourable women but bring not four witnesses, scourge them with eighty stripes and never afterwards accept their testimony. These indeed are evil-doers." (24:4)

This provision does not only forbid false accusation of adultery but also lays down concrete punishments for the crime. The main punishment so prescribed is scourging with a certain number of stripes. But there is a secondary punishment as well; that is, deprivation of the right to bear witness. There is however no other punishment prescribed by the Shariah for such a false accusation.

Use of Liquor has been tabooed by this Quranic Injunction:

"Strong drinks and games of chance and idols and divining arrows are only an infamy of Satan's handiwork. Leave it aside in order that ye may succeed." (5:90)

The Holy Prophet (S.A.W.) forbids drinking or the use of intoxicant in the following words:—

"Everything that intoxicates is forbidden."

Again,

"If a large quantity of a thing intoxicates, small quantity thereof is also forbidden."

But no definite punishment has been prescribed for drinking by the Prophet. According to one tradition be gave nine stripes for drinking. There goes another tradition which says that the number of stripes was not fixed. During the caliphate of Hazrat 'Umar (R.A.A.) all the companions of the Prophet arrived at the consensus that treating the drunkard on the analogy or a slanderer, he should be punished with eighty stripes; for in a state of delirium or intoxication men rhapsodizes and utters lies. Thus, in conformity with the Prophet's saying and practice as well as the consensus of his companions, punishment for drinking came to be determined; for like the Prophet's practice and sayings, the consensus of his companions is one of the sources of Islamic Shariah. In other words the Prophet's Sunnah and the consensus of his companions have the status of the provisions of Islamic Law.

The Quranic injunction pertaining to the crime of larceny is as follows:—

"As for the thief, both male and female, cut off their hands." (5:38)

The above provision declares theft as unlawful and clearly lays down punishment for it.

As regard murder, subversion and plunder, Allah has said:—

"The only reward of those who make war upon Allah and His Messenger and strive after corruption in the land will be that they will be killed or crucified or have their hands and feet on alternate sides cut off or will be expelled out of the land. Such will be their degradation in the world and in the hereafter theirs will be an awful doom." (5:33)

According to the above provision murder, subversion and causing turmoil and disruption in the land have been declared unlawful acts punishable by punishment, amputation of hands and feet death and hanging.

About the crime of apostasy the divine injunction is:

"And whoso seeketh a religion other than Islam it will not be accepted from him." (3:85)

Again, says Allah:—

"And whoso becometh a renegade and dieth in his disbelief:such are they whose works have fallen both in the world and the Hereafter." (2:217)

The Holy Prophet says in the same context:—

"Whoever renounces his religion should be put to death."

In another Tradition he has said:—

"Shedding the blood of a Muslim is unlawful with the exception of three persons, viz. married adulterer, murderer and apostate."

These, then, are the provisions declaring apostasy unlawful and prescribing punishments for it.

And as for rebellion, Allah says:—

"And if two parties of believers fall to fighting, then make peace between them. And if one party of them doeth wrong to the other, fight ye that which doeth wrong till it returns unto the ordinance of Allah." (39:9)

The Holy Prophet (S.A.W.) enjoines that:—

"When you are agreed on the leadership of a man and some comes to you with the intention of breaking up your unity and causing disruption among you, then kill the disruptionists". There is another Tradition about rebellion:—

Evil deeds will be done and the person who wants to split up the *Ummah,* put him to death, whoever he may be."

According to the foregoing provisions, rebellion of one group against another is unlawful, and armed action and death are enjoined as the punishment of insurgence unless the rebellious group ceases to agitate.

Hitherto we have been discussing crimes entailing *huds.* In

the course of our discussion we have stated the provisions and the prescribed punishments pertaining thereto. In fact, the Islamic Shariah has delimited these punishments so meticulously that even the judge has no chance in respect of their nature and quantum and that one can identify to a nicety the kind of crime and the *hud* ordained, although some of these crimes by their nature entail a double *hud*. Well, then, the Islamic Shariah does not allow the judge to reduce, change or postpone such punishments. It does not recognize the circumstances relating to both the crime and the criminal, just as it does not confer on the executing authority the power to remit punishments. That is why the punishments of *huds* are called the right of Allah or the ordained punishments, indicating that such punishments are invariably fixed and imperative. They warrant no interference.

(II). In cases of Qisas *Diyat*. There can be no crime and Punishment without Provision

(92) Bearings of the above rule on crimes entailing *qisas* and *diyat*.

The Islamic Shariah brings to bear this principle on crimes in question meticulously and minutely. There can be no better proof of this than the relevant provisions.

Crime involving *qisas* are as under:

(a) Wilful murder
(b) Wilful dismemberment of limbs and
(c) Wilful infliction of injury.

Crimes involving *diyat* fall under the following heads:—

(a) Crime entailing qisas if *qisas* is remitted or if there is anything repugnant to carrying out the sentence of qisas.
(b) Qisas-Wilful murder
(c) Murder by mistake
(d) Dismemberment of limbs by mistake and
(e) Infliction of injury by mistake

The divine injunction as to wilful murder is as follows:—

"And slay not the life which Allah has forbidden save with right." (17:83)

Again,

"O' ye who believe! Retaliation is prescribed for you in the matter of the murdered; the free man for the free man and the slave for the slave and the female for the female and for him who is forgiven somewhat by his (injured) brother, prosecution according to usage and payment unto him in kindness". (2:178)

"A we prescribed for them therein:The life for life etc." (5:45)

The Holy Prophet has laid down that:—

"Whoever has taken the life of a Muslim, his life is to be taken in retaliation unless the victim's heirs agree otherwise."

Besides, says the Prophet:

"If a man is murdered, his heirs have the option to retaliate or agree to accept *diyat*."

And the following tradition determines the amount of *diyat:*

"*Diyat* for murder is a hundred camels."

To sum up, the above injunctions declare wilful murder as culpable and also provide for its punishment which may be commuted into *diyat* provided that the heirs of the victim agree to accept *diyat*. The amount of *diyat* as provided or is a hundred camels.

As regards wilful dismemberment of hands and feet and wilful infliction of injury Allah says:—

"And there is life for you in retaliation, O! men of understanding, that ye may ward off evil." (2:179)

Says He in the same context:

"And We prescribed for them therein:The life for the life and the eye for the eye and the nose for the nose and the ear for the ear and the tooth for the tooth and for wounds retaliation. But whoso forgoeth (in the way of charity) it shall be expiation for him. Whoso judgeth not by that which Allah has revealed:such are wrong doers." (2:179)

Again,

"And one who attacketh you, attack him in like manner as he attacked you." (11:194)

The same injunction has been repeated in another verse.

"If ye punish, then punish with the like of that where with ye were afflicted." (16:126)

The above injuctions unequivocally provide that causing the loss of limbs is a culpable act and the punishment for committing such a criminal act is *qisas*.

As regards quasi-wilful murder, the Prophet has given the following verdict:

> "The amount of *diyat* for wilful murder committed by mistake is a hundred camels, whether the weapon used for the offence is a whip, lathi or stone."

According to this Tradition quasi-wilful murder is a crime punishable by *diyat*.

The Quranic injuction in respect of murder committed by mistake is as follows:—

> "It is not for a believer to kill a believer unless it be by mistake. He, who hath killed a believer by mistake, must set free a believing slave and pay the blood-money to the family of the slain, unless they remit it as a charity. If he (the victim) be of a people hostile unto you, and he is a believer then the penance is to set free a believing slave. And if he cometh of a folk between whom and you there is a covenant, then the blood-money must be paid unto his folk and also a believing slave must be set free. And whosoever has not the wherewithal must fast two consecutive months. A penance from Allah. Allah is Knower, Wise." (4:92)

And the Holy Prophet determines the quantity of *diyat* in one of his Traditions:—

> "*Diyat* for error is twenty camels, four year old, Twenty camels five year old; twenty female colts, two year old; twenty male colts, two year old and as many female colts, three year old."

According to both the injunctions cited above murder by mistake is unlawful and the punishment for it is *diyat*. They also

specify the quantum and the quality of punishment.

The Prophet has laid down punishments for the amputation of the various organs of the body in such a manner that loss of a singie organ thereon entails full *diyat* and the loss of one of the pair of organs entails half *diyat*. His injunction in this respect is as follows:—

> *Diyat* (in full) is incurred by the amputation of entire nose, tongue, penis, back-bone, both the hands and both the feet, both the testicles and both the ears while the amount of *diyat* for one eye is fifty camels and for one tooth is five camels.

The Holy Prophet has laid down *diyat* for various faculties such as hearing, eye sight and reason:

For injuries of various description, the punishment as provided for by him are as under:

(a) Partial *diyat* for injury opening the bone (called Moziha) is five camels.
(b) Partial *diyat* for head injury breaking the bone is ten camels (called hashima).
(c) One third *diyat* for other wounds of head and face (called ama and damigha meaning injuries penetrating to the skin of the brain and to brain respectively).
(d) Also one third for the wound extending from head and face down to stomach.

One of the fundamental principles of the Shariah is that in the case of any loss of the victim's organ for which the Prophet has specified no *diyat* or a part thereof,[1] the judge shall refer the matter to well-informed persons and pass judgement in the light of their assessment. But the amount so assessed shall not exceed that which Holy Prophet might have determined for an injury bearing affinity to the one mentioned above. There is consensus of the Ummah on this principle.

Punishments for wilful amputation of organs and infliction of injuries and unintentional commitment of the same offences are identical. However, they are quantitatively different;[2] for according to the Tradition of the Holy Prophet intentional

1. *Diyat* means full amount of *diyat* and 'Qrash' means a part thereof;
2. For instance if, *diyat* entailed consists of animals, the ages would vary.

commitment thereof entails severe imposition of *diyat* and unintentional commitment requires milder imposition of *diyat.*

In short punishment for most of the offences resulting in the loss of organs are unequivocally determined by the explicit provisions of the Shariah and in certain other cases by consensus which is a source of Islamic law and which binds a person with obligations in the same way as do the explicit injunctions of the Shariah.

From the foregoing statement it has become crystal clear that explicit provisions exist in relation to crimes involving *qisas* and *diyat* as well as to punishments thereof. The Islamic law has determined the punishments for such crimes so meticulously that even a judge is not allowed any choice in the matter; nor is he empowered to determine the quantum thereof. His job is only to pass a sentence in conformity with the prescribed punishment after the charges against the offender have been established, regardless of the circumstances of the offender and those wherein the crime has been committed.

It is also noteworthy that in cases of qisas and *diyat* the powers conferred on the judge are similar to those he has in cases of crimes involving *huds*. But if the aggrieved person or his *heir* or guardian pardons him, then the judge is under the obligation to pass the sentence of *qisas* or *diyat* or award such other punishment as is determined by the Shariah or the head of the State.

Qisas and *diyat* are preordained punishments since their nature and quantum are predetermined. Such a sentence is the right of the aggrieved person or his heir or guardian who can remit it. He is at liberty either to exercise this right or forget it. But the head of the state (or for that matter competent authority or the judge) has no power to annul or remit the punishment of qisas or *diyat;* for he can neither annul the right of Allah nor that of the individuals.[1] In any case he is under the obligation to fulfil the requirements of those rights as it is his duty to do so.

1. The jurists of Islam divide the rights affected by crimes in two categories:(a) Rights relating to Allah (b) Rights relating to individuals. The rights relating to Allah are either rights of the Lord, pure and simple or any other right wherein the Lord's right predominates. Similarly the rights deemed to be pertaining to individuals are those which are either

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(93) In the Case of Penal Crimes There can be no Crime and Punishment without a provision.

The principle that an act cannot be treated as a punishable crime without provision has been brought to bear by the Shariah on Penal crimes also as it ought to have been applied as a logical consequence; for it is a fundamental principle of the Shariah and as such it cannot be overlooked. However, the Shariah does not apply it to the penal crimes in the same manner as it does to the crimes entailing huds, qisas and diyat respectively; nor does it confine the operation of this doctrine to such a narrow sphere when applying it to the former as it does in the case of crimes involving huds and qisas. It has rather been allowed a much

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purely the individuals' rights or any other right wherein the right of the individual is predominent. The crime affecting the rights of Allah are those which prejudice the life and parts of individuals. Crimes affecting the individual's rights are those that prejudice the life and rights of individuals. By regarding certains rights as those of Allah what the jurists actually mean is that they can be invalidated neither by the individuals nor by the community. On the other hand, by categorising certain rights as the rights of individuals, the jurists mean that they can only be invalidated or relinquished by the individuals to which they belong.

The truth of the matter is that any issue prejudicing personal interest ultimately affects the interest of individual rights and any crime prejudicing the rights of the individuals ultimately affects the interest of the community, although such a crime makes its impact exclusively on the right of the individual. Hence the jurist hold that every right belonging to individual involves the right of Allah, for it is an obligation of every responsible individual towards Allah- that he should refrain from causing trouble to any of His bondsmen. (See Sharhul Zarqiani ala Mukhtasar Khalil Vol. 8. P. 110). In short, the Shariah declares certain crimes as harmful to collective interest inasmuch as they are more detrimental to the society than to the individual. Like-wise it marks off certain crimes prejudicial to the individual interest because they do greater harm to the individuals than to the society.

In fact, under the Islamic Shariah making punishment obligatory and awarding it accordingly is the right of Allah. However, in respect of certain punishments the Shariah gives the individual the right of awarding them. Thus he or she has the option to get a certain sentence passed or relinquish his or her right to do so. In case of relinquishment, the society has the right to sentence the offender to some other punishment in keeping with the circumstances of the criminal as well as those wherein the offence is committed. In other words the fact that certain punishments constitute the right of the individual does not negative the right of the society to provide for other punishments and amend them accordingly.

To sum up, a right is ascribed to Allah when it is purely in the -interest of the community or wherein collective interest is predominent. Obviously Allah's right does not involve Allah's interest (Who is above all interests). What is actually meant in ascribing a right to Him is that neither the individuals nor the society can invalidate such a right, since it belongs to Allah.

commitment thereof entails severe imposition of *diyat* and unintentional commitment requires milder imposition of *diyat*.

In short punishment for most of the offences resulting in the loss of organs are unequivocally determined by the explicit provisions of the Shariah and in certain other cases by consensus which is a source of Islamic law and which binds a person with obligations in the same way as do the explicit injunctions of the Shariah.

From the foregoing statement it has become crystal clear that explicit provisions exist in relation to crimes involving *qisas* and *diyat* as well as to punishments thereof. The Islamic law has determined the punishments for such crimes so meticulously that even a judge is not allowed any choice in the matter; nor is he empowered to determine the quantum thereof. His job is only to pass a sentence in conformity with the prescribed punishment after the charges against the offender have been established, regardless of the circumstances of the offender and those wherein the crime has been committed.

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To sum up, a right is ascribed to Allah when it is purely in the -interest of the community or wherein collective interest is predominent. Obviously Allah's right does not involve Allah's interest (Who is above all interests). What is actually meant in ascribing a right to Him is that neither the individuals nor the society can invalidate such a right, since it belongs to Allah.

wider scope for operation, inasmuch as public interest and the penal character of such crimes demands their extension to a wider sphere. But this wider sphere of operation relates only to punishments to the exclusion of the penal crimes themselves.

The above doctrine has been extended to a wider sphere because in case of penal crimes the Shariah does not lay down such specific punishments as are incumbent upon the judge to award as is the case with huds and qisas. In fact, the judge enjoys the power to choose any punishment from the penal code. He is also empowered to reduce a penal punishment or award a more severe one.

The above principle admits of wider application in relation to crimes, inasmuch as in the case of certain crimes with distinct qualities it warrants than bringing to hear upon the extension of a general provision rather than bringing to bear upon them a specific provision of the Shariah.

(94) The Meaning of Penal Punishments

In order to elucidate the implications of the above doctrine it is necessary to explain what is meant by the term, 'penal punishment; or *'Tazeer'*. Penal punishment is actually a corrective measure for which no *huds* have been laid down in the Shariah.[1]

In other words, it is punishment entailed by an offence for which the Shariah does not prescribe a separate punishment. Such punishments are in harmony with *huds* so far as they aim at correction and castigation of the offender and vary with the kinds of offences;[2] but they are at variance with *hudood*[3] on two grounds:

(1) There is a fixed punishment (or punishments) for every crime entailing a *hud* which is immutable and admits of no option. As distinct from this, there is a whole code of penal measures ranging from warning to flogging and imprisonment. In case of most dangerous crimes even capital punishment may be awarded. The judge may, at his discretion, order any of those

1. (a) *Al-Ahkam-ul-Sultania p.* 502.
   (b) *Badae'-wal-Sanae'*, Vol. 7 p. 63
   (c) *Asna-al-Matalib*, Vol. 4 p. 166.
2. Hudood in this context means punishments fixed for Qisas and *Diyat*.
3. *Al Ahkamul Sultania*

corrective measures in view of the offenders circumstances, psychology and part moral conduct. The judge is empowered to award more than one punishment, commute a punishment or award a more severe one or suspend the execution of a sentence if he deems it necessary for the correction of the offender.

(2) The heir of the offender has no right to remit a hud, whereas in the case of a penal punishment the heir may remit it as a whole or in part.

(95) There is no provision in the Shariah as to each and every penal crime.

The Shariah does not contain provisions as to each and every penal crime; nor does it invariably fix a punitive measure for as it does in the case of crimes entailing huds and qisas. The Shariah, in fact, contains provisions only in relation to such penal crimes which are perpetually detrimental to individuals community and general peace and tranquility. It rather empowers the head of the State to declare any act unlawful, which he deems prejudicial to peace and tranquility under prevailing circumstances. Moreover, the head of the State has the power to frame rules and regulations for the maintenance of peace and tranquility and punish those who oppose or violate them. The extent of powers conferred on the head of the State in regard to penal crimes is greater than the extent of those allowed under specific provisions and limited thereby. But the head of State has by no means been allowed unlimited freedom in the absence of specific justification for punishment in the Shariah. It is in fact incumbent upon him to pass judgement in all cases in conformity to the Shariah and consistent with the spirit and fundamental principles thereof.

(96) Kinds of Penal Punishments *(Tazeers)*

There are three kinds of penal punishments:

(1) Punishments for crimes (sins)
(2) Punishments for offences against public interest and
(3) Punishments for misdemeanours.

The first kind of punishment is enjoined for act which are forbidden by the Shariah and the commission whereof is termed as crimes or sins *(ma'asee)*.

Penal punishments falling under the second head is enjoined for deeds which in themselves do not constitute prohibited acts but assume the character of such acts on account of certain qualities.

Punishment of the third kind is entailed by acts which Shariah forbids as such but describes their commission as misdemeanour or *mukhalafat* and not as a crime or sin.

PUNISHMENT OF THE FIRST KIND

(97) Penal Punishment for Crimes (ma'asi)

All the jurists of Islam agree that penal punishment is entailed by any crime (sin) for which the Shariah does not provide for a hud or penance, whether it is an offence against Allah or one bearing on man. An offence against Allah means any act that affects the rights and peace of community and disturbs its law and order situation. By the offence against man is meant an act that prejudices the rights of the individuals.[1]

Crime (Ma'syat)[2] refers to any act the commission or omission whereof has been forbidden by the Shariah.

An unlawful or forbidden act is that which it has been imperatively enjoined to abstain from. The following Quranic verse contains such an absolute injunction:—

"Forbidden unto you (for food) are carrion and blood and swine flesh."

It also comprises prohibition of an act with a definite explanation:—

"And come not near unto adultery.

Lo'! it is an abomination and an evil way." (17:32)

Again,

"And slay not the life which Allah hath forbidden save with right." (17:38)

Prohibition is sometimes accompanied by a command:—

"Strong drink and games of chance and idols and winning arrows are only an infamy of Satan's handiwork. Leave it aside." (5:90)

In certain cases a warning includes punishments:

"And those who accuse honourable women and bring not four witnesses, scourge them with eighty stripes."(24:4)

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1. (a) *Al Muhazzab*, Vol. 2, p 603.
   (b) *Mawahib-ul-Jaleel*, vol. 6, pp 319-320
   (c) *Al-Mughni wal Sharh-ul-Kabeer*, Vol.10, p 347.
   (d) *Hashia Ibn-e-Abideen* Vol., 3, p251.
   (e) *Al Zaila'ee* Vol. 3, *p.207*
2. *Ma'siyat* (plural ma'asi) means exactly what the word 'crime' connotes in modern legal terminology.

Duty may be defined as an act explicitly enjoined upon a responsible person in positive terms:—

> "And from among you there should be a party who invite to good and enjoin right conduct and forbid the wrong." (3:104)

Again,

> "Lo! Allah commandeth you that ye restore deposits to their owners and if ye judge between mankind, that ye judge justly." (4:58)

An unlawful act is different from an undesirable act. In the case of latter, one is required to abstain therefrom, but injunction prohibiting is not imperative. If the inhibitory injunction constitutes an absolute command, the act involved is unlawful. Similarly a duty is different from a desirable act because such an act is not imperatively enjoined. If the injunction for doing an act is imperative, the act is a duty.

Sometimes unlawful and undesirable acts are confounded with each other because of ambiguity. Similarly a desirable act is confounded with duty. In such a case we have no alternative for determining the true nature of an injunction but to depend on prohibitions. If prohibitions tend to show that the injunction is an absolute and unqualified command, then the act so enjoined is a duty. However, if a prohibition or command appears in all probabilities to be other than imperative, the act involved is desirable or undesirable as the case may be.

In case of ambiguity, one of the most reliable probabilities is the punishment laid down for the act at issue. Thus if the injunction prohibiting or enjoining an act does not include a specific punishment, the act is undesirable or desirable as the case may be, provided, nevertheless, that there is no other probability of its being imperatively prohibited or enjoined. Hence some of the *ulema* specializing in jurisprudence define an unlawful deed as a punishable act. The offender who commits an unlawful act or omits a lawful one is liable to punishment, Similarly, an undesirable act is that the commission whereof is not punishable just as a desirable act is one the omission whereof entails no punishment. But according to other scholars of jurisprudence these definitions are not comprehensive.

According to the jurists there are three kinds of crimes.

(1) The first kind of crimes is that for which punishment has been explicitly provided for. Sometimes expiation is added to the prescribed punishment. Such crimes include murder, theft, adultery and other offences involving huds, qisas and diyat. Only these crimes fall under the first category, since they comprise the crimes for which punishments have been laid down in the Shariah. There are seven crimes involving huds and five those involving diyat and qisas.

An aspect of such crimes is that due to the punishment on *hud* entailed by them, penal punishment becomes needless. However, if the public interest is in jeopardy, there is nothing inhibiting the combination of a penal punishment with a *hud.* This is the position held by all the four schools of Islamic jurispudence. Imam Malik for instance, deems it fit to add penal punishment to qisas for wilfully committing any offence involving qisas except death sentence. The argument advanced by the Imam in support of his position is that *qisas* is the requital for offence, and it is the right of the aggrieved person whereas penal punishment is a corrective measure and it is the right of the community as distinct from the right of an individual. Imam Malik does not deem it proper to combine *qisas* and corrective measures in cases of wilful murder, since the latter would serve no purpose along with death sentence. However, if *qisas* is annulled[1] for some reason or other penal punishment may be awarded.

The school of Imam Shafiee also allows the combination of corrective punishment with a *hud.*[2] For instance, *diyat* as a *hud* is imperative in case of a murder for which *qisas* is not essential. Such a crime would entail punishment in addition to *diyat.* Or take another example:according to Imam Shafiee the hud for drinking is forty stripes. If the offender is scourged with more than forty, stripes, the stripes in excess would be reckoned as penal punishment. Or again, if the amputated hand of a thief

1. *Mawahib-ul-Jaleel,* Vol.6, P 247; *Sharh-ul-Durdeer,* Vol. 4, P. 224.
2. *Mawahib-ul-Jaleel,*

is hung round his neck, amputation is obviously the *hud* but hanging of the amputated hand round the neck is penal punishment.[1]

The School of Imam Ahmed, too, permits the hanging of amputed hand to the thief's neck.[2] One may infer from this that the said school like others authorise the combination of penal measures with *hud*.[3]

And according to Imam Abu Hanifa, banishment of an unmarried adulterer constitutes penal punishment rather than a *hud*. In other words - his school allows addition of banishment to the prescribed punishment of *hud*. This means that the Hanafite school also deems it proper to combine a penal measure with a *hud*.[3]

(2) The second category of crime is that for which no *hud* has been laid down while expiation has been made obligatory. An example of such crimes is sexual intercourse while fasting during the holy month of Ramazan or while one is under taboo during the performance of Hajj (Pilgrimage).

Expiation, in essence, is a kind of worship since it is made by setting a slave free, fasting or feeding the poor. If expiation is not meant to atone for a crime, it is purely a kind of worship; as for example feeding the poor as an atonement for one's inability to fast during Ramazan. But it is purely a punishment when one is under the obligation to expiate an offence. Murder by mistake or sexual intercourse in the state of *'zihar'* (quasi-divorce or repudiation which constitutes by describing one's wife as one's mother). In such a case the offender has to pay in cash or kind for the offence he commits. Sometimes expiation comprises a sentence such as fine and at others a compensation provided that it is intended for compensating the aggrieved party. Sometimes expiation consists of both punishment and compensation. When these two are combined, it assumes the character of *diyat*.

Crimes falling under this category are offences involving *huds* and call for expiation. Crimes of this nature comprise breaking

1. (a) *Asna-al-Matalib* Vol.4, P 162.
   (b) *Nihayat-ul-Muhtaj*, Vol. 8. P. 18.
2. *Al Mughni* Vol.10, P 266.
3. (a) *Badae'-wal-Sanae'*, Vol.7, P. 39.
   (b) *Sharh Fath-ul-Qadeer*, Vol. 4, P.136.

of fast or oath and sexual intercourse during menstrual period of one's wife or coition in case of repudiation.[1] Jurists differ on penal punishments for the second category of crimes. Some jurists hold that such crimes do not entail penal punishment and that expiation is the only right punishment for them. As opposed to this group of jurists, there are others whose position seems to be more tenable. They are of the opinion that expiation may be combined with penal punishment.[2]

(3) The third category of crime involves neither *hud* nor explication; for instance, kissing a women other than one's wife, or remaining with her in private, begin to steal and eating impure meat (meat of unlawfully slaughtered animal). All crimes excluded from the foregoing two categories fall under this head and such crimes are innumerable.

The kind of crimes that involves neither *hud* nor expiation is multifarious. It may, however, be subdivided into three species.

(a) In the first group are included those acts that do involve *hud* but do not, by virtue of the genus to which they belong, fall within the province of crimes; for instance, stealing of unsafe property, or property the quantity whereof is less than that prescribed for *zakat*. If these conditions of larceny are not present then the crime of theft does not entail *hud*. Other kinds of such crimes are initial acts leading to adultery such as meeting a woman in private other than one's wife, kissing and embracing her. In short, any act for which a *hud* is prescribed but which is devoid of the conditions of *hud* constitutes a crime that calls for penal punishment rather than *hud*.

(b) Another class of this category consists of crimes for which a *hud* is prescribed but the *hud* so prescribed is invalidated by an element of doubt. Examples of such crimes are unnatural sexual relationship with one's wife and stealing of joint property.

1. Here the views of various jurists have been put together. Some jurists prescribe expiation for coition during menstrual period while others do not consider it necessary. Similarly some of them are of the view that eating and drinking while fasting calls for expiation.
2. (a) *A'alam-ul-Muaquieen*, Vol. 4, P 22.
   (b) *Al-Muqaddama, Ibn-ul-Rushd*, Vol.2 P 151.
   (c) *Tabsira*, Vol.2, P 259.
   (d) *Asna-ul-Matalib*, Vol.4, P 162
   (e) *Nihayat-ul-Muhtaj* Vol.8, P 81.

This species of crimes also include offences for which the prescribed hud is nullified by subjective factors; that is factors existing within the person of the criminal; for instance, murder of son by father which does not entail quisas or stealing of ancestor's property which is not punishable by the amputation of hand. Only penal punishment shall be awarded for such crimes.

(c) The third kind of crimes belonging to the class under discussion are those which involve no *hud* either as species or genus. Such crimes are numerous and include offences like eating the meat of an animal not slaughtered according to the lawful procedure, drinking blood, eating the flesh of swine or breach of trust by a person to whose custody property is entrusted, for instance, by the custodian of property, a supervisor, a guardian *(wasi)* or a lawyer. Other instances are the use of substandard weights and measures. giving false evidence, charging interest, abusing and taking bribe.

(99) The Way Crimes are Ascertained

Crimes have been explicitly stated in the Shariah, whether any *hud* or expiation has been laid down for them or not. Thus if anyone wishes to know what crimes actually are, he should simply study the relevant injunctions of the Quran and Sunnah. In other words, the method of distinguishing crimes as specified by the Shariah is the same as that of modern law; that is to study law. Hence if anyone studies the Shariah and acquaints himself with it, he will have a knowledge of acts constituting crimes according to Shariah. If anyone does not study the Shariah, he will remain Ignorant of acts, as he would remain unfamiliar with crimes defined by the modern law if he does not study it. Now if the crimes as defined by the Shariah have not been codified, there is nothing wrong with the Shariah itself; for what matters is not that the crimes mentioned by the Shariah are not available in a codified form but that provisions do exist in relation to all the crimes specified by the Shariah as such, as well as the punishments pertaining thereto. Moreover there is nothing in the Shariah inhibiting the people in authority to codify in a single volume the injunctions containing such crimes, classifying each category in accordance with its species, punishment and

circumstances of occurrence or by some other criterion facilitating its study and detection.

If anyone studies the Shariah, he will surely find out that it contains a provision for every criminal act whereby it is declared unlawful and that if a crime entails penal punishment, relevant provision is to be found therein as well as provisions requiring punishment for such a crime and for other offences.

We have mentioned earlier in our discussion of crimes involving *huds, qisas* and *diyat* that provisions exist whereby such crimes are declared unlawful and also provisions whereby punishments for such crimes have been laid down. All such crimes fall under the first category, which basically entails *hud* but sometimes expiation as well. We now deal with the second category of such crimes which entails only expiation and about which as we have pointed out, the jurists differ as to the penal punishments for these crimes. At any rate we propose to set forth the injunctions relating to the second category and proceed to present those pertaining to the third that entails neither *hud* nor expiation.

(100) Crimes entailing expiation to the exclusion of *Hud.*

We have already pointed out that this kind of crimes include the following acts:

a) Breaking of *Fast.*

b) Violation of the *Hajj Taboo.*

c) Breaking of *Oath.*

d) Sexual intercourse with one's wife during menstural period, or in the case of *zihar* (what in the absence of a better equivalent in English may be termed as "quasi-divorce")

We now discuss these criminal acts at length one by one.

Says Allah:—

"O' ye who believe fasting prescribed for you even as it was prescribed for those before you." (183:2)

At another place it has been laid down:—

"It is made lawful for you to go unto your wives on the night of the fast. They are raiment for you and ye are raiment for them. Allah is aware that ye were deceiving yourselves in this respect. He hath turned in mercy towards you and refined you.

So hold intercourse with them and seek that which Allah hath ordained for you, and eat and drink until the white thread becometh distinct to you from the black thread of the dawn. Then strictly observe the fast till nightfall." (2:187)

Hazrat Abu Huraira (R.A.A.) relates the following tradition about a case of sexual intercourse during Ramazan:—

A man came to the Prophet (S.A.W.) and said, "O' Messenger of Allah! I am finished!"

The Prophet enquired of him the cause of his distress. He replied that he had been guilty of coition with his wife during the Holy month of Ramazan.

"Have you got any slave to set free?" asked the Prophet.

"None", was the reply.

"Can you keep fast for two months continuously?"

"I am afraid, not." answered the man.

"Well then, can you feed sixty destitutes?" enquired the Prophet

"No I can't." having said this the man sat down.

In the meantime a bowl[1] full of dates was offered to the Prophet He gave it to the man and said," Go and give this in charity." The above injunctions declaring fasting a sacred duty and violation thereof an offence are unequivocal. One of them already clearly lays down the punishment for breaking fast. The person guilty of it is required to set free a slave or keep fast for two months at a stretch or feed sixty destitutes. That is the penance prescribed for his guilt.[2]

1. In the original tradition the word 'farq' has been used for bowl. It is actually a measure consisting of 132 oz. It was used to measure grains etc.

2. The jurists differ on the application of the injunction in the Prophet's Tradition cited above. Imam Malik and Imam Abu Hanifa regard it as applicable to cases of breaking fast by eating and drinking as well, whereas Imam Shafi'ee and Imam Ahmed share the view of those who cling to the verbal interpretation of the injunction and confine it exclusively to cases of sexual intercourse. The real cause of difference between the two groups is that according to the former the grounds of punishment is the act of breaking fast which may consist of eating, drinking, coition and the like; while the other group holds that the punishment laid down is meant for coition alone and that the injunction in question is therefore applicable to acts of coition to the exclusion of all others. There are certain other points of difference in this regard. Two of them are worthy of note:some jurists hold that the injunction applies to the female as well as the male. Others, on the contrary, are of the view that it applies to the male only. Similarly there are jurists who apply the injunction

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As regards breaking of the *Hajj taboo*, Allah decrees as follows:—

"Perform the pilgrimage and visit Mecca for Allah. And if ye are prevented, then send such gifts as can be obtained with ease and shave not your heads until the gifts (offerings) have reached their destination. And whoever among you is sick or hath an ailment of the head must pay a ransom of fasting or alms giving or offering. And if ye are in safety then whosoever contenteth himself with the visit to pilgrimage (shall give) shall give such gifts as can be had with ease "and whosoever cannot find such gifts, then a fast three days while on the pilgrimage, and of seven when ye have returned; that is ten in all. That is for him whose folk are not present at the invaluable place of worship." (2:196)

Again,

"The pilgrimage is in the well known months and whoever is minded to perform the pilgrimage therein (let him remember that). There is to be no lewdness nor abuse not angry conversation on the pilgrimage." (2:197)

At another place it has been said:—

"to hunt on land is forbidden for you so long as you are on the pilgrimage." (5:96)

There is yet another verse of the Holy Quran which enjoins that:

"O' ye who believe! Kill no wild goose while ye are on the pilgrimage. Whoso of you killeth it of set purpose he shall pay its forfeit in the equivalent of that which he hath killed, of domestic animals the judge to be two men among you

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to intentional breaking of fast, while there are others who think that breaking of fast intentionally or unintentionally makes no difference. Some jurists again bring to bear the principle of interpretation on the act of breaking fast which requires only a single penance; while there are others who believe that this belief cannot be extended to the offence under consideration. All these differences as a matter of fact pertain to the interpretation and application of the injunction under discussion. It is not necessary to reproduce here all the discordant views in this respect. The reader, however, is referred to the following works

(1) *Bidayath-ul-Mujtahid* Vol. I. P. 210.
(2) *Al-Hidaya* Vol. I, P. 96
(3) *Al-Iqina 'a,* Vol. I, P. 212.
(4) *Al-Muhazzab,* Vol. I, P. 183.

known for justice (the forfeit) to be brought as an offering to the Ka'ba: or, for expiation he shall feed four persons or the equivalent thereof in fasting, that he may taste the evil consequences of his deed." (5:95)

Once again

"O' ye who believe, profane not Allah's monuments, nor the sacred month, nor the offerings nor the victims with garlands." (5:2)

According to a Tradition related by Hazrat Ka'ba bin Ajra a man was on pilgrimage along with the Holy Prophet (S.A.W.). In the meantime louses grew in his hair. The Prophet ordered his head to be shaven, and ask the man to keep fast for three days, feed six indigent persons each getting two measures of grain or other eatables or offer a goat in sacrifice.

The jurists agree that shaving of head is not an end in itself. What it actually aims at is to avoid ostentation's. Similarly use of perfume and clothes also fall under the category of thir gs forbidden during pilgrimage. A tradition related by Hazrat Ibn-e- 'Umar may be cited in this context. In this tradition the Prophet is quoted to have said about muhrim (or a person tabooed during pilgrimage) that he should not wear a shirt, shalwar, cap, amama and shoe. In case a pair of chapples is not available, he may wear a shoe having cut it off below the ankle joint. Besides he should not wear perfumed clothes or clothes scented with saffron.

There are t words occurring in one of the verses of the Holy Quran cited above that need explanation: *"Rafath'* an *'fusooq.'* 'Rafath' means Coition while *'fusooq'* connotes abstaining from things forbidden under the hajj taboo, and then doing things that were lawful prior to the operation of the taboo such as hunting, use of perfume and wearing sewn clothes.[1]

The injunctions we have been dealing with hitherto disallow things that infringe the *hajj taboo* and lay down punishments for the infringement thereof. At any rate these injunctions are

1. (a) *Tafseer-ul-Minar,* Vol. 2, P 217.
   (b) *Hidayath-ul-Mujtahid,* Vol. I P 286.
   (c) *Al-Muhazzab* Vol. I, P 204.
   (d) *Al Hidaya* Vol. I, P.125
   (e) *Ali Qinia,* Vol. I, P 355.

unequivocal and there are no two opinions among the jurists as to the things forbidden thereby and the punishments laid down for the violation of the above taboo.

BREACH OF OATH

The following verses of the Holy Quran may be cited in this context:—

"And make not Allah, by your oaths, an hindrance." (2:224)

"Allah will not take you to task for that which is unintentional in your oaths but he will take you to task for the oaths you swear in earnest. The expiation thereof is the feeding of ten of the needy with the average that wherewith ye feed your own folk, or clothing of them or the liberation of a slave and for him who findeth not (the wherewithal to do so, then a three day's fast." (5:89)

Again, the Holy Prophet (S.A.W.) is quoted to have said to Abdur Rahman bin Simra (R.A.A.), "Do not ask for authority:for if you secure it at your own request, you will be left to it. But if you get in without request, you will be associated therein. If you swear on oath to do something but later find that you can do something better, then do what is better, paying penance for your oath."

The above injunctions prohibiting breach of oath and prescribing punishment for the breach are crystal clear.[1]

Sexual Intercourse During Menstruation

"They question thee ('O' Muhammad) concerning menstruation:Say it is a kind of pollution; so let women alone at such times and go not unto them till they are cleansed." (2:222)

According to a tradition told by Ibn-e-Abbas, the Prophet has made it obligatory for a person guilty of coition during menstruation of his wife to give one *dinar* in alms. Others say

1. (a) *Hidayath-yl-Mujthahid* Vol.:1, P. 329
   (b) *Al-Muhazzab,* Vol. 2, P. 150.
   (c) *Al Hidayah,* Vol. 2, P. 63
   (d) *Ali Qinia,* Vol. 4, P. 337.

that the amount of alms prescribed is half a *dinar*, however, Ibn Abbas reports that if a man is guilty of coition during menstrual period he is under the obligation to pay one *dinar* in alms; but if he commits such an act near the end of the period, he is required to pay only half a dinar. The Prophet is also quoted to have laid down that one guilty of coition during menstruation must give five *dinars* in alms.

The Quranic injunction pertaining to sexual intercourse with one's wife during mensturation is clear. Imam Ahmed accepts the tradition related by Ibn Abbas in this respect as authentic. He, therefore, treats payment of one dinar as essential for the atonement of sexual intercourse during forbidden period.[1] But the remaining three Imams reject the tradition in relation to such an illegitimate act as incorrect and do not impose any penance for it. They are rather guided by the principle that an injunction which cannot be proved by argument is null and void.[2]

From the fact that expiation is not regarded as obligatory by some jurist, it may be inferred that in their opinion such an illegitimate act belongs to that category of offences which entail neither *hud* nor expiation but may call for penal punishment.

SEXUAL RELATION IN CASE OF *ZIHAR*

The divine injunction in this respect is as follows:-

"Those who put away their wives (by saying they are as their mothers) and afterwards would go back on that which they have said, the penalty in that case is the freeing of a slave before they touch each other. Unto this you are exhorted and Allah is informed of what ye do.

And he would findeth not wherewith let him fast for two successive months before they touch each other, and for him who is unable to do so, the penance is the feeding of sixty needy ones." (58:3-4)

1. *Al Iqinia*, Vol. I, P 64
2. (a) *Bidayt-ul-Mujtahid* Vol. 1, P. 46.
   (b) *Al Hidayah*, Vol. 1, P. 81.
   (c) *Al-Muhazzab* Vol. 1, P. 36.

The above provision determining *'Zihar'* and the penalty thereof is unquestionable.[1]

(101) Crimes entailing neither *Hud* nor Expiation

We have already mentioned that crimes entailing neither *hud* nor expiation comprise three categories

(a) Those entailing no *hud* themselves although crimes bearing affinity thereto involve *hud*.

(b) Those which entail no *hud* themselves because of some inhibition although crimes bearing affinity to them do.

(c) Those entailing no *hud* themselves, nor do those similar thereto.

We have quoted injunctions as to offences of categories (a) and (b) in connection with crimes entailing *hudood, qisas* and *diyat*. But most of the crimes fall under category (c). Had these been limited, we would have cited all the injunctions pertaining to them as we have done in the case of other categories of crimes; but since crimes of this class are innumerable we have not cited all the relevant injunctions and have contented ourselves with citing such injunctions only as relate to important crimes in order to prove that Islamic Shariah brings to bear on such crimes as

1. The jurists differ in their interpretation of the words 'Yaoodoona lima Qaloo' (go back on that which they have said, 'Occuring in the verse cited above. Three of the Imams Malik, Shafi'ee and Ahmed take it to mean that the offender should return to the act which he makes unlawful for himself; that is, intending to enter into sexual relationship with his wife or keeping her away from himself or do both. Hazrat Mujahid, Hazrat Taoos and Imam Abu Hanifa on the contrary construe the expression.....

   '(go back) as to offenders' returning to their acts of which they committed in the days of ignorance. Dawood Zahiree, on the contrary thinks that the offender should repudiate twice (utter the words amounting to Zeher) to incur any penalty of expiation; otherwise he has neither to go back nor pay any penalty. According to three Imams Malik, Shafi'ee and Ahmed, Zihar, is a simple offence, whereas in the opinion of the rest particularly Hazrat Dawood it falls under the category of habitual offences and does not assume criminal character unless repudiation is repeated. On this the first act of *zihar* does not turn into an offence unless it is repeated and as such does not call for any expiation. The penalty of expiation is incurred by the second act of *zihar*. Please see also the following works:-

   (a) *idayat-ul-Mujtahid* Vol.2, P 87.
   (b) *Al-Hidayh* Vol.3, P 14.
   (c) *Al-Muhazzab* Vol.2, P.120
   (d) *Al-Iqnaa*, Vol.4, P 82.

well the principle that both crime and punishment pre-suppose the existence of provision.

(a) Prohibition of Certain Edibles

The Quranic injunctions in this regard are as follows:

"He hath forbidden you only carrion and blood and swine-flesh and that which hath been immolated to the name of any other than Allah. But he who is driven by necessity, neither craving nor transgressing, it is no sin for him." (2:173)

"Forbidden unto you for food are carrion and blood and swine-flesh and that which had been dedicated unto any other than Allah and the strangled and the dead through falling from a height and that which hath been killed (by the goring) of horns and the devoured of wild beasts, save that which ye make lawful (by the death stroke and that which hath been immolated unto idols. And (forbidden is it) that ye swear by the driving arrows. This is an abomination." (5:3)

"The beast or cattle is made lawful unto you (for food). Except that which is announced unto you herein." (5:1)

"And makes lawful to them pure things and makes Unlawful to them impure things." (7:157)

Again, the Holy Prophet has said, "The dog is unclean and its price too is unclean."

Hazrat Jabir describes an incident with reference to an injunction of the Holy Prophet:—

"We slaughtered horses, mules and donkeys during the battle of Hunein. But the Prophet disallowed us the eating of mules and donkeys while permitting the flesh of horses."

Besides Hazrat Ibn Abbas quotes the Prophet as prohibiting the flesh of all the animals with pointed hoofs as well as that of all the birds with pointed and curved claws.

And according to a Tradition related by Hazrat A'isha there are five animals which the Prophet has allowed to be killed not only outside but also inside the *Haram* and they are:the snake, the rats, the white crow, the kite and the rabid dog.

(b) Breach of Trust

"Says Allah:

"Lo! We offered the trust unto the heavens and the earth and the hills, but they shrank from bearing it and were afraid of it. And man assumed it. Lo! he hath proved a tyrant and a fool." (34:72)

In another verse has been said:

"Lo! Allah commandeth you that ye restore deposits to their owners and if ye judge between mankind that ye judge justly." (4:58)

Again,

"O' ye who believe! Betray not Allah and His Messenger, not knowingly betrary your trusts." (8:27)

In another verse it has been enjoined:

"Give unto the orphans their wealth. Exchange not the good for the bad (in your arrangement thereof) nor, absorb their wealth into your own wealth." (4:2)

Once again:

"Deliver over unto them their fortune; and devour it not by squandering and in haste lest they should grow up."(4:6)

There is yet another verse enjoining:

"Come not near the wealth of the orphan save that which is better." (27:34)

Another still:

"Those who devour the wealth of orphans wrongfully, they do but swallow fire into their bellies and they will be exposed to burning flame." (4:10)

Yet another:

"O' you who believe! do not devour your property among yourselves falsely, except that it be trading by your mutual consent." (4:29)

Besides, the Holy Prophet enumerates the distinguishing characteristics of a hyprocrite in one of his sayings:

"A man having four qualities is a hypocrite to his finger tips. If he possesses one of the four qualities, he has then one quality of impostor unless he shakes it off. The qualities are:— he commits breach of trust whenever something is

kept in his custody; whenever he tells something, it is a lie; whenever he enters into a transaction, he is dishonest, and whenever he picks up a quarrel, he abuses."

Also there is another saying of the Holy Prophet:

(c) Use of False Weights and Measures

Says Allah:

"Woe unto the defrauders:those who when they take the measure from mankind demand it full. But when they measure unto them or weigh for them, they cause them loss."

(83:1-3)

In another verse it has been enjoined:

"Give full measure and be not of those who give less (than the due)." "And weigh with the true balance. Wrong not mankind in their goods, and do not do evil making mischief in the earth." (26:181-183)

(d) Giving False Evidence

Allah enjoins:

"When the witnesses are summoned, they should not refuse to appear." (2:282)

Again,

"Hide not testimony. He who hideth it, verily his heart is sinful." (2:283)

There is yet another verse to this effect:-

"O' ye who believe, remain firmly clung to justice and bear witness for Allah, even if it is against your own relatives."

Another verse still:

"And they who do not bear witness to what is false." (25:72)

Yet another verse to the same effect:—

"So shun the filth of idols and shun lying speech." (22:30)

And the following Tradition has come down from Hazrat Abu Bakr (R.A.A.):—

"Holy Prophet said to us:

"Shall I tell you what major sins are?" He repeated this sentence three times. We replied, "Certainly, O' Messenger of Allah!" He said, "Ascribing plurality to Allah and disobedience to parents." The Prophet happened to be sitting at ease with a pillow serving as a prop. Suddenly he got up and sitting straight added. "Giving false evidence!" He repeated this sentence again, and again so much so that we wished he kept quiet."

(e) Charging Interest

The Quranic injunctions in this context are as follows "Those who swallow usury cannot rise up save as he ariseth Whom the devil has prostrated by (his) touch. That is because they say':Trade is just like usury; whereas Allah permitteth trading and for-bideth usury." (2:275)

"Allah hath blighted usury and made alms-giving fruitful." (2:276)

"O' ye who believe! Observe your duty to Allah, and give up what remain (due to you) from usury, if ye are (in truth believers), and if you do not, then He warned of war against you from Allah and His Messenger. And if ye repent, then ye have your principal (without interest). Wrong not and ye shall not be wronged. (2:278-279)

"O' ye who believe! Devour not usury doubling and quadrupling (the sum lent). (3:130)

That which ye give in usury in order that it may increase on other people's property has no increase with Allah." (30:39)

Again, the Holy Prophet is reported to have warned against seven deadly sins. "What are those seven deadly sins, 'O' Messenger of Allah?" asked his companions.

The Prophet replied,

"Ascribing plurality to the godhead, sorcery, taking a life unjustly that Allah has forbidden, charging interest, usurpation of orphan's property, taking to flight from the battlefield and slandering a chaste and simple Muslim woman."

(f) Abuse:

Says Allah:

"Allah loveth not the utterance of harsh speech save by one who has been wronged." (4:148)

"Revile not those unto whom they pray beside Allah lest they wrongfully revile Allah through ignorance."(6:109)

"Begin not hostilities. Allah loveth not aggressors." (2:190)

Again,

"O' ye who believe! Let not a folk deride a folk who may be better than they (are,), nor let women deride women who may be better than they are; neither defame one another, nor insult one another by nicknames. Bad is the name of lewdness after faith." (59:11)

And the Prophet has said," One Muslim is brother to another Muslim, whom he should not oppress, insult or look down upon."

According to another Tradition:

"To scorn a brother in faith is a great evil. The life and property of one Muslim is forbidden to another Muslim."

Also:

"Reviling a Muslim is inequity and slaying him is infidelity."

(g) Bribery

The Quranic injunctions as to bribery are as under "They are listeners of falsehood and greedy for illicit gain." (5:42)

"And eat not up your property among yourselves in vanity, nor seek by it to gain the hearing of the judges that ye may knowingly devour a portion of the property of others wrongfully." (2:188)

And the Holy Prophet has said:

"He who takes bribe and he who gives it as well as the middleman who brings about an agreement between them all will be cursed!"

Again,

"May God curse the man who takes and gives bribe for the passing of a judgement."

Also,

"Gifts to noblemen constitute breach of trust and gifts to authorities are unlawful."

According to a tradition related by Hazrat Abu Hameed Saidee, The Holy Prophet appointed Ibn-ul-Latbiah, Collector of Zakat and sent him off to do the job. Having performed the task entrusted to him, he returned to the Prophet and said:"This much is yours and this much is mine as it has been presented to me.

The Prophet replied, "We have nice people around, indeed! We send them as functionaries for what Allah has made us incharge of, and they come back and tell us that so much is ours and so much being presented to them, is theirs. This man should have remained idle within his house. We would then see whether or not he receives any present."

(h) Gambling and Game of Chance.

The Quranic injunction in this respect is as follows:

"'O' ye who believe ! Strong drink and games of chance and idols and divining arrows are only an infamy of Satan's handiwork. Leave it aside....." (5:190)

(i) Entering Other's Premises without permission

Says Allah:

"O' Ye who believe! Enter not houses other than your own without first announcing your presence and invoking peace upon the folk thereof. That is better for you, that ye may be heedful. And if ye find no one therein, still enter not until permission hath been given." (24:27)

Again,

"It is no sin for you to enter uninhabited houses wherein you have your effects." (24:29)

(ii) Spying:

Allah commands:"And spy not." (49:12)

The ten offences mentioned above are major penal crimes: We have also quoted the injunctions pertaining to then. A study of these injunctions makes it crystal clear that the crimes they refer to, are unambiguously defined. Anyone who has knowledge of the Shariah realizes that the Islamic law condemns such

unequivocal provisions pertaining to all the unlawful things that not only is the crime determined but the punishment entailed by it is also prescribed. The injunctions we have cited as to the offences involving *hud* and expiation indicate that the Shariah applies the following principle to each and every case

"Acts declared by the Shariah unlawful constitute no crime, nor entail punishment, unless a relevant provision exists."

(102) Baseless Assumptions

Some people wrongly assume that the Shariah has not determined penal crimes. It has left this function to the judge. From this fallacious assumption they proceed to infer that the judge enjoys absolute powers in this respect since there are no provisions whatsoever as to penal crimes and punishments thereof. In short, they are of the view that the whole affair of penal punishment has been left to the judges' discretion. He may, if he deems it fit, pass sentence for an act which may not have been unlawful previously and for which no precedent of punishment may have existed. As a matter of fact the entire logic behind such thinking is erroneous inasmuch as it stems out of fallacious notions devoid of any element of truth and justice.

The erroneous thinking of these people owes itself to their ignorance of Islamic Law. The books on Islamic law are very penetrative with their texts subtle and comprehensive. At most places they are far more subtle than books on modern law. Moreover, the jurists of Islam have their specific terminology with their own interpretations, which ought to be fully understood before commencing the study of Shariah, just as it is essential to be acquainted with legal terminology for studying modern law. Obviously, a man ignorant of Islamic legal provisions of the Shariah cannot properly comprehend the texts of books on Islamic law. This exactly holds good in the case of those who maintain that Shariah has not determined penal crimes and punishments for them. They have not actually been able to grasp the interpretations of the jurists of Islam. Had they understood them well, they would have learnt that the Shariah has determined the acts which it treats as crimes. It first of all requires the judge to ascertain whether or not the act attributed to the accused is a

crime according to the provisions of the Shariah. If it is really so, then he has to ensure the establishment of the charge leveled against the accused. If the charge is established, the judge may award any of the punishments prescribed by the Shariah provided that the punishment so awarded is both quantitatively and qualitatively commensurate with the crime and fit for the criminal. But if the judge finds that the act has not been mentioned as an offence in the Shariah, it is no crime at all and requires no punishment; for the Shariah does not confer on the judge or for that matter, on anybody else to declare an act a crime which or for that matter, on anybody else to declare an act a crime which the Shariah does not treat as one; nor does it empower him to award a punishment for any crime which is not prescribed by the Shariah. If anybody acts otherwise, he would be declaring lawful what is forbidden by Allah and unlawful what is allowed by Him, and thus be guilty of calumniating Allah.

(103) Writings of Jurists on Penal Punishments

The foregoing statement may be substantiated with reference to the writings of the jurists

A Hanafite jurist says:

"Every crime involves penal punishment but no concrete forms of such punitive measure have been laid down. It depends upon the judgment of the *Imam* who should determine the kind of penal punishment required by the nature of offence and the circumstances of the people.[1]

A jurist of the Shafi'ee school declares that a man guilty of an offence which entails neither *hud* nor expiation shall be awarded such punishment as the rules deem it.[2]

Again, a jurist of the Malikee school expresses the following view after enumerating various crimes involving *hud* and *qisas:*

"An offence other than these requires penal punishment depending on the judgment of the *Imam.* However, in cases of crimes against Allah as well as those prejudicial to human right, the penal punishment to be awarded is limited."[3]

And a Hambalite jurist has this to say

1. *Al Zela'e',* Vol. 3, P208.
2. *Al Muhazzab* Vol. 2, P306.
3. *Mawahib-ul-Jaleel,* Vol. (?) P 319

"Penal punishment is actually a corrective measure which is to be awarded, of necessity, in cases that require neither hud nor expiation. The minimum quantum of penal punishment is not specified. It is rather dependent on the judgement of the Imam or the authority concerned who should award such punishment as he may deem fit keeping in view the offender's circumstances.[1]

The implications of the opinions cited above cannot be fully grasped unless the meanings of the terms crime, *hud,* expiation prescribed punishment and un-prescribed punishment are first clearly understood.

The terms crime and 'expiation' have already been explained. Let us now try to acquaint ourselves with the connotation of *hud.* Hud means a punishment prescribed by the Islamic Shariah. The expression 'being prescribed'. implies that the law-giver has specified both the nature and quantum thereof and the judge has powers neither to determine its kind and quantity diminish or enhance it, change it or put off its operation. It is an obligatory punishment and by virtue of its specification and pre-determined quantum it assumed the character of a *hud,* although it may, by nature, admit of two *huds*. For example, the punishment laid down for an unmarried adulterer is a hundred stripes. This punishment is not amenable to reduction or enhancement. Hence it has become a simple punishment involving a single *hud,* though it may, by nature, assume the character of a punishment comprising two *huds*. Similarly, the *hud* laid down for calumniation is eighty stripes. The number of stripes so prescribed can neither be diminished nor increased, inasmuch as it is determined before hand. In the same way the punishment of *qisas* has been invariably laid down, admitting of no reduction or enhancement. Likewise, *diyat is a* prescribed punishment involving a hud that absolutely determines the kind of punishment and the quantum thereof, leaving no choice for the *Qazi* to increase or decrease it.

By unprescribed punishment is meant a punishment wherein the judge is empowered to select the kind of punishment to be awarded from among many penalties open to his choice. If the punishment is not a simple one involving a single *hud,* then the judge has the power to determine its quantum without exceeding the lower and upper limits thereof.

1. *Al-IQNAA,* Vol. 4, p 268.

If we are familiar with the connotations of these terms, we can easily understand the views of the jurists pertaining to penal punishments. When the jurists say that every crime entails penal punishment, they mean that any crime declared by the Shariah as a forbidden act involves penal punishment, and when they say that nothing is prescribed as punishment for a penal crime, they mean that no such definite punishment has been prescribed for a penal crime as cannot be dispensed with, as is the case with crimes entailing *hudood, qisas* and *diyat* As a matter of fact a number of punishments have been proposed, and it is not binding upon the judge to award anyone of them to the exclusion of others. He has rather been empowered to choose anyone or more than one of those penalties.

(6) If one of the punishment' so chosen involves two limits, he may either award the lower limit or the upper one. In other words, since the Shariah provides for penal punishments, such a punishment is pre-determined, but as it does not make obligatory any limit of the punishment provided for, the quantum thereof has not been fixed. When the jurists say that penal punishment is dependent upon the discretion of the *Imam* or the decision he arrives at on the basis of analogy *(qisas)* drawn by him, it means that the judge who acts on behalf of the *Imam* or the ruler enjoys the powers to select a punishment according to the nature of crime and the circumstances of the offender as well as in conformity with the decision *(ijtihad)* he arrives at on the basis of analogical reasoning.

(104) How Shariah Determines Penal Punishments

We have seen that the Shariah contains provisions wherein penal crimes have been determined. We have also cited relevant provisions and discussed general principles governing their determination. We have, moreover, quoted the provisions under which 'acts constituting penal crimes are declared illegitimate. Besides, we have shown that the Shariah contains provisions pertaining penal punishments just as it provides for penal crimes.

Let us now try to illustrate these punishments with reference to the injunctions of the Shariah.

(1) Exhortation, Warning or Corporal Punishment

Injunctions as to these punishments are to be found in the Holy Quran as well as the Sunnah. Says Allah:--

> "And as to those (women) on whose part you fear desertion, admonish them, leave them alone in their sleeping places and beat them; then if they obey you, do not seek a way against them." (4:34)

This verse provides for three distinct punishments relating to a disobedient wife:admonition or exhortation, separation to beds and beating. Now, as the disobedience of woman is an offence that entails neither *hud* nor expiation, it follows that these punishments may be applied to all crimes involving neither *hud* nor expiation.

Although leaving women alone to their beds is a penalty which could be given to wives alone and that too, by their husbands, there are other kinds or separation or boycott as well. The Holy Prophet ordered boycott of three of his companions who lagged behind at the Battle of Batook. Hazrat 'Umar (R.A.A.) also ordered the boycott of Sabee. In other words boycott comes to an end as soon as the boycotted woman repents.

The Holy Prophet has said:

> "May Allah have mercy on the man who hangs his filth in a house at a place where it could be seen by the members of his family.

Again,

> "Do not raise stick against your family."

There is yet another saying of the Prophet:

> "Teach your off springs how to offer prayer till the age of seven and beat them if they give up saying prayer at the age of ten."

Yet another Tradition to the same effect:

> "The man who takes the penalty of a *non-hud* crime to the degree of hud is a transgressor."

According to the above injunctions two kinds of punishments are obligatory:

I. (a) Warning of punishment and intimidation.

This is implied by the expressions, 'hanging of filth' and raising a stick'

(b) Beating with a stick and scourging

The last of the above injunctions is explicit as to the legitimacy of scourging for crimes other than those entailing *hudood*, as a jurist holds that this injunction prescribes the higher limit of physical punishment.

In short the Holy Quran and the Sunnah lay down the penalties of exhortation, separation and intimidation or warning. Of these penalties chastisement and beating, by, nature, involve two limits. Hence some people are of the view that in the junction last cited the higher limit of punishment has been prescribed, while others hold that the determination of higher limit is left to the discretion of the person in power.

Exhortation and warning constitute, by nature, punishments with a single limit and the limit of boycott as has already been indicated, is the repentance of the person boycotted.

II. Censure

Hazrat Abu Zar (R.A.A.) is quoted to have reported the following tradition:

I told the Prophet:"I reproached a man, wounding his pride by speaking ill of his mother's lineage." "Didst thou speak ill of his mother ?" said Prophet. "Thou still hast the vestiges of the days of ignorance." In other words the Prophet rebuked Abu Zar (R.A.A.). Thus rebuke, being the *sunnat* of the Prophet, also constitutes a penal punishment, as the Sunnah whether verbal or practical, is the second source of the Shariah.

III. Imprisonment and Execution

The source of these two punishments, too, is the practice of the Prophet. It has been reported that the Prophet imprisoned a person who was found guilty of slander and hanged another person named Abu Nab at the top of a mound.

IV. Killing

This punishment is traceable to a saying of the Holy Prophet:

"If you arrive at consensus on the choice of a man and someone comes to undermine your solidarity and seeks to disintegrate your party, then kill him."

Another Tradition to the same effect runs as follows:

"If someone seeks to cause a split in the ranks of the *Ummah*, then slay him with a sword."

It is taken for granted that death sentence is intended for dangerous crimes.

Categories of penal punishments having been determined by the Quranic injunctions, the practice of the Holy Prophet and the consensus of the *Ummah*, the judge, according to the consensus, enjoys the power to choose and determine such punishment as he may deem fit in the same way as he has the power to pass a sentence or suspend the execution thereof.

(105) In the Case of Penal Punishments, as in all Other Cases, Both Crimes and Punishments Presuppose Provisions in the Shariah

From what has been said above, it is clear that the Islamic law contains provisions pertaining to all the penal crimes and corresponding punishments which have been so subtly and comprehensively determined that the judge cannot award punishment for an act that has not been declared unlawful by the Shariah, nor can he pass such a sentence as has not been provided for; nor can he overstep the limits laid down for him.

In the presence of explicit injunctions mentioned above coupled with the evidence of the incident involving the offence, the observation that the judge enjoys authoritative powers in respect of penal crimes does not hold good. In fact, such a view is the result of the lack of understanding and ignorance of the Shariah. One who has a full grasp of the provisions of the Shariah and is familiar with the terminology used by the jurists, would find it beyond doubt that no authoritative and for that matter, unauthoritative powers have been conferred on the judge in determining penal crimes and corresponding punishments; that these have been specified in the injunctions of the Shariah and that the judge is empowered only to apply an injunction to the case preferred to him. If he finds that the injunction is applicable,

then he may pass a sentence. However, the Shariah confers on the judge the power to choose any of the numerous penalties prescribed for the crime. For this purpose he has to take into account the antecedents of the accused and assess the extent to which he is likely to be affected by a punishment. He will, moreover, have to keep in view the possible impact of the crime on the community. The Shariah also allows the judge the choice to award one punishment or more than one or the higher or the lower limit of a punishment. Besides he enjoys the power to admonish, censure, and threaten the offender and warn him to desist from the offence in future; or if he so chooses, fine the offender and sentence him to imprisonment. Again, the judge is empowered not only to pass a sentence but also to suspend its execution.

The above powers conferred on the judge by the Shariah are not actually authoritative. They are in reality designed to enable the judge to correct the offender and prevent the crime. At any rate, the powers in question are selective and conjectural rather than authoritative and absolute. The motive underlying them is to allow the judge to make a proper assessment of the offence and the offender and propose the right punishment for him accordingly. Such powers of the judge or the court embody the spirit of justice, whereby all the obstacles and difficulties in the way of justice are removed and passing of the right sentences is facilitated so that the offender may get his deserts.

The pattern of remedy laid down by the Islamic Law thirteen hundred years ago is being adopted by the modern law today. It is the same pattern on which the modem law seeks to expand the ambit of judicial powers so that punishment may be decided on and the quantum thereof assessed in accordance with the circumstances of the offender and the nature of offence. Hence modern law now allows the court the choice between two punishments between the higher and the lower limit of a punishment as well as the power to suspend the execution of a sentence or to enforce it. Nevertheless powers of the court as provided for in the modern laws are much less than those conferred by the Shariah on the Qazi (judge). And in most cases the court finds itself unable to award a punishment suited to the circumstances of the case preferred. That is why a great majority of experts specializing

in modern law is constrained to seek expansion in the powers of the court. Some of them even insist that no punishment should be provided for in the law for a crime as such but that only crimes should be specified with punishments separately stated so that it may be possible for the court to enforce any of the punishments so given and also that the court should be allowed the power to award such punishment as it may deem fit in consideration of the circumstances of the offender and his crime. This is exactly the procedure followed by the Islamic law.

SECOND CATEGORY

PENAL PUNISHMENTS IN PUBLIC INTEREST

(106) Penal Punishments to Safeguard Public Interest

One of the basic principles of the Shariah is that penal punishment can be awarded only by for an act that constitutes a crime in itself i.e. a forbidden act regarding which there exists an injunction in the Shariah declaring it unlawful. But the Shariah admits of certain exceptions to this rule. Under these exceptions, penal punishment may be awarded for an act if public interest so requires, even though such an act may not in itself be a crime as defined by the Shariah, with no injunction declaring it unlawful.[1]

It is not possible to list in advance the acts and circumstances falling under the exceptions to the above rule, since the acts in question are not intrinsically unlawful but are treated as such because of a certain quality in them. When this quality predominates they become unlawful, and when it is absent, they resume their normal legitimate character. The reason for the treatment of such an act as punishable is that the commission thereof is harmful to public peace and maintenance of law and order. If this quality of culpability is present in any act and circumstance of the person guilty thereof, then such a person deserves to be punished. But if the quality in question is no longer present, then there is no question of punishment. Hence punishment is awarded in the public interest. The condition of it is that the person guilty of such an act is liable to following charges:

(a) That he has committed an act prejudicial to public interest and maintenance of law and order, and

(b) That he is found in a condition prejudicial to public interest and maintenance of law and order.

1. (a) *Nihayath-ul-Muhtaj*, Vol. 8, p. 81.
   (b) *Al-Iqnaa* Vol.4, P.269.
   (c) *Ibn-e-Aabideen* Vol.3, pp 251-259.
   (d) *Tabsirath-ul-Hukkam* Vol.2. P.26.

If a case is preferred in the court indicating a person for being guilty of an act or being found in a state prejudicial to the public interest or peace and tranquility, and the charge against him is proved, then it will be improper for the court to acquit him. He should rather be awarded one of the various penal punishments suited to the act constituting the offence, even though the act in itself may not be unlawful and therefore entailing no punishment.

Warranteed by the public interest and the requirements of the maintenance of law and order, as binding, for if the accused is allowed free movement till the charge against him is established, he may either abscond or a wrong verdict is passed against him or a sentence passed against him may not be carried out.

The jurists advocate penal punishment in public interest on the analogy of a precedent to be found in the Sunnah. The Holy Prophet is reported to have once imprisoned a person accused of stealing a camel. But the accused was not found guilty and was naturally released.[1] The jurists argue that in the above case imprisonment constitute a penal punishment for the actual punishment could only be awarded after the establishment of the charge against him. Thus the Prophet by this practice has authorised the punishment of anyone who present himself in a condition amenable to impeachment — or circumstances warrant his impeachment, regardless of the fact that the act he may have been guilty of is not unlawful. The Holy Prophet has treated such a punishment as mandatory and the justification for it is public interest and the requirements of the maintenance of law and order for if the accused is allowed free movement till the charge against him is established, he may either abscond or a wrong verdict is passed against him or a sentence passed against him may not be carried out. In short the basis of punishment in such a case is the safeguard of public interest and peace.

The jurists also draw an analogy from the practice of Hazrat 'Umar (R.A.A.) to justify penal punishment for safeguarding public interest. It is said that as the caliph was once on a round of the city of Madina, he overheard a woman saying," I wish I could drink wine or have access to Nasr Bin Hujjaj". Hazrat 'Umar

1. *Sharh Fathul Qadeer* Vol.4, P 117.

sent for Nasr who happened to be a very handsome youngman. He got Nasr's head shaven. But with the shaven head he appeared to be more attractive then before. The Caliph then, banished him to Basra lest the women of the city, fascinated as they were by his masculine, beauty, should become licentious. From this it is argued that by banishing Nasr, Hazrat 'Umar awarded him penal punishment since he felt that Nasr's presence in Madina was detrimental to public interest notwithstanding the fact that it was only Nasr's beauty that was responsible for him state of impeccability although he never meant to do any harm to public interest and peace and tranquility.

An example of penal punishment in public interest is the chastisement of children for giving up offering prayer or being careless in keeping themselves cleanly and, their admonishment for deeds forbidden by the Shariah, although such deeds do not constitute crimes in the case of children who are incapable of discrimination between right and wrong, and as such they are neither under moral obligation nor their misdeeds constitute disobedience and crimes[1], (although some jurists regard such misdeeds as crimes in themselves). They will therefore not be awarded prescribed punishments but will be given penal punishments for the sake of public interest.

Another case of penal punishment necessitated by the demand of public interest is the detention of a lunatic. If the movement of a lunatic among the people in general is harmful to the latter, he is prevented from mixing up with them. Again, if a man is known to be a nuisance to the public, he is put behind the bars, although there may be no proof of his being guilty of any act specified as unlawful.

The principle of punishment in public interest warrants any action designed to guard peace and tranquillity and maintenance of law and order from dangerous persons, habituals, revolutionaries and trouble makers. This principle is derived from those tenets of the Shariah which provide for eliminating general nuisance by causing particular nuisance and for the remedy of greater harm with lesser harm.

1. (a) *Nihayat-ul-Muhtaj* Vol. 8, P. 81.
   (b) *Al-Jqnaa*, Vol.4, PP 269-273.
   (c) *Badu'e-wal-Sanae'*, Vol.4, P.64

(107) Penal Sentence by the Court are not Authoritative

As has already been said penal punishments may be awarded in the case of all those acts which the Shariah does not specify as unlawful intrinsically. It is impossible to list all such acts and the court is empowered to pass any penal sentence whenever a case of this nature is preferred to it, provided that the act involved is a potential danger to the common weal and public interest. However, if no harm is feared to the common weal therefrom, the court will acquit the accused. Again, whatever punishment the court chooses to award, will be one of the penal punishments; for the powers of the court in such cases are not authoritative and un-restricted. There are certain limits imposed upon them by the Shariah which must be observed. As a matter of act, in the case of penal punishments under discussion, the powers of the court are not any greater than those it enjoys in respect of crimes specified in the Shariah. If so being the case, one can only say that powers are conferred on the court in respect of penal punishments without a provision to the extent that it may propose any punishment which it deems fit in consideration of the circumstances and capacities of offenders. Obviously the Shariah does not allow the court the power to define crimes and lay down punishments for them of its own accord. In short the Shariah confers judicial powers within the limits of the fundamental principle that crimes and punishments pre-suppose provisions. The Shariah is so strict about this principle that it is extended to entire punishments awarded in public interest.

It will be wrong to think that the court is empowered to declare any act unlawful which it considers detrimental to public interest and social system, as the Shariah lays down an explicit condition for awarding penal punishment, and that is, the act or circumstances for which it is awarded is actually doing harm to the public interest and social system. This instruction is the limitation of crime itself and comprises an explicit injunction to the effect that a person who does an act to the prejudice of public interest and social order or is found in a state posing a threat thereto, shall get one of the penal sentences laid down for crimes. An act which is not unlawful in itself is treated as such because of its quality that renders it amenable to prohibition.

(108) Penal Punishment in the Public Interest also Presupposes injunctions of the Shariah.

The Shariah never deviates from the principle that crimes and punishments presuppose in injunctions. However, the scope of judicial powers in the case of penal punishments for safeguarding public interest is wider than in the case of punishment for habitual crimes. Thus it allows the court the powers of passing any of the various penal sentences for an act prejudicial to the public interest and social system. Unlike crimes entailing *hudood, qisas* and *diyat* in respect whereof it provides for a definite injunction declaring an act unlawful and laying down corresponding punishment, or unlike crimes in respect whereof it provides for an injunction prohibiting an act unlawful it lays down to principle that in respect of any act or situation detrimental to public interest and social the Court is empowered to award any of the various penal punishments at its discretion.

We now proceed to deal with different methods the Shariah adopts in the application of the principle that crimes and punishments presuppose provisions indicating at the same the difference between those methods.

(1) When Injunction Regarding Crime is Provided for

The Islamic Shariah has determined every act constituting an offence entailing *hud, qisas* and *diyat* unequivocally. An act of this nature is a crime at all times and in all circumstances, whereas an act requiring penal punishment in public interest is not defined as such but only a quality of it is marked off, inasmuch as such act may not necessarily have this criminal ingredient Thus the same act may be detrimental to public interest and social system in some circumstances while in others it may not be so.

(2) When Punishment is Provided for

The Shariah provides punishment in respect of crimes in all circumstances. It has laid down imperative punishments for crimes entailing *hudood, qisas* and *diyat* separately but as regards penal punishments it prescribes only a set of penal punishments empowering the court to award any of those punishments.

This, in short, is how the Shariah applies the principle that no crime is punishable unless it is so provided for in the Shariah. It is however, applied on a wider canvass in the case of penal punishments necessitated by public interest. Hence it cannot be complained that the accused is penalized for an act which is not unlawful or that he was ignorant of the illegitimacy of the act for which he is penalized; for the Shariah also enjoins punishment for acts and circumstances inimical to the commonweal and social order. It is, therefore, necessary that everyone should abstain from such acts. It is also incumbent upon everyone to be mindful of circumstances prejudicial to public interest and social system.

(109) Grounds of Justification for Penal Punishment *(Tazeer)* in Public Interest

The reason for thus determining penal crimes by the Shariah lies in social requirements. Collective security and public interest demand provision for such flexible injunctions as may be applicable at all times and on all occasions and could be useful in any eventuality. Evidently no provision could be more flexible to suit social requirements than the one we have been dealing with hitherto. In the presence of such a provision, anyone thinking of doing something harmful to the society will, of necessity, refrain from doing it, and even if such a person manages to escape the effect of the immutable injunctions, will not be able to elude such flexible provisions. You will see that the modern laws have incorporated this concept of the Islamic Shariah in order to safeguard social order and public interest.

THIRD CATEGORY

PENAL PUNISHMENT FOR MISDEMEANOUR

*(110) **Penal Punishment (Tazeer)** is actually awarded for the commission of acts forbidden and omission of those enjoined. The jurists are unanimous on this point. But they differ on the question whether penal punishment or tazeer for the commission of undersirable acts and omission of desirable ones is enjoined or not. One group of them holds that it is enjoined,[1] while another thinks that it is not.[2] This difference of opinion has given rise to controversy regarding the definition of desirable and undesirable acts. Thus the jurists who hold that an undesirable act implies prohibition of it, but also the choice of commission thereof take the position that as the undesirable implies no prohibition and the desirable no command, the commission of the former and omission of the later entails no penal punishment; for punishment is enjoined only when the agent is under the moral obligation to do or not to do an act. On the Contrary according to those jurists, who maintain that the undesirable is identical with prohibition admitting of no choice, and the desirable consists of command that allows no choice of omission, penal punishment for the omission of the desirable and commission of the undesirable is permissible. But they do not regard commission of an undesirable and omission of a desirable act as a crime and the agent thereof as an offender notwithstanding the fact that they consider penal punishment for it as permissible. They also look upon the agent of misdemeanour as one guilty of error rather than as an offender, since they are of the view that*

1. (a) *Al Ahkam fi usool-il-Ahkam, Ibn-e-Hazm*, Vol. I, P 43.
   (b) *Al Iqnaa*, Vol. 4, pp 270-271.
   (c) *Mawahib-ul-Jaleel*, Vol.6, P.320.
   (d) *Badae'-wal-Sanae'* Vol.7, P 63.
   (e) *Sharh-e-Musallimus-Suboot*, Vol. I, pp 111-112.
2. (a) *Al Ahkam fi usool ul Ahkam lil Aamdi* Vol. P170.
   (b) *Tuhfat-ul-Muhtaj*, Vol.8, P 18.
   (c) *Mawahib-ul-Jaleel*, Vol.6, P 320.
   (d) *Tabsirat-ul-Hukkam*, Vol.2 pp 256-260.
   (e) *Al Ahkam-ul-Sultania lil Aamdi*, P.76

Contd.. on next page

crime calls for censure, whereas commission and omission of the undesirable and the desirable acts respectively does not.[1]

Those in favour of penal punishment justify their position on the basis of Hazrat 'Umar's precedent. Once Hazrat 'Umar (R.A.A.) passed by a man who was about to slaughter his goat. He was sharpening his knife while the goat was bound up. Hazrat 'Umar (R.A.A.) scourged him and said, "Why did not you sharpen your knife before hand."[2]

The jurists favouring penal punishment for misdemeanour, however, lay down the condition that punishment should be awarded when commission or omission of an act is repeated. They argue that mere commission or omission does not incur punishment, which is necessitated only by habit, and habit is formed by committing or omitting an act twice.[3]

Nevertheless if the commission of the undesirable and the omission of the desirable is detrimental to public interest, and social order, the agent shall be punished even if the condition of repetition is not fulfilled. Both the jurists in favour of and against penal punishment for misdemeanour are agreed on this point, inasmuch as the basis of punishment in this case is not the commission of an undesirable act or omission of a desirable one, but its harmfulness to the commonweal and the social order.

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(f) *Al Mustasfa Lil Ghazali,* Vol.1, P.76.
(g) *Al Ahkam fil Usool ul Akkam, Lil Aamadi* Vol. I, PP 73-174.
(h) *Mawahib-ul-Jaleel* Vol. 6, P 320.
(i) *Tabsirat -ul-Hukkam,* Vol. 2, p.259-260.
(j) *Al Ahkam-ul-Sultania,* P. 712.

1. (a) *Al Mustasfa Lil Ghazali,* Vol.1, P.76.
   (b) *Al Ahkam fi Usool-il-Ahkkam, Lil Aamdi,* Vol.1, PP 73-174.
2. *Mawahib-ul-Jaleel,* Vol. 6, P. 320.
3. (a) *Mawahib-u(4aleel* Vol.6, p.320.
   (b) *AlAhkam-ul-Sultania.* p.312.

FOURTH CATEGORY

APPLICATION OF DOCTRINE OF ESSENTIALITY OF PROVISION IN MODERN LAWS

(111) Introduction of Doctrine of Essentiality of Provision In Modern Laws

The principle that crimes and punishments presuppose provisions was introduced into the Modern Law towards the end of the eighteenth century, as it came to the surface in the wake of the French Revolution. Before that the courts in the West enjoyed absolute powers for the determination of crimes and punishments. They regarded any act as crime for the illegitimacy whereof no legal provision existed and accordingly awarded any punishment they chose. It was the absolute powers of the Court themselves that necessitated the incorporation of the above doctrine in the Modern laws.[1]

(112) How the Modern Laws enforce the Above Doctrine

This doctrine is no longer enforced by the Modern Law the way it did at the early stage of its introduction. The reason is that it was first incorporated in the French Law, wherefrom it was derived by other modern laws. Now the French Law applied it in the beginning most rigorously. It rigidly determined crimes and corresponding punishments so minutely that the court had no power to reduce or enhance the punishment. It so being the case the only function left the court was to award a prescribed punishment to the offender on establishment of charge against him or acquit him if the charge could not be proved, regardless of the fact whether or not the circumstances of the offender and the offence affect the relevant punishment. The enforcing authority had no power whatsoever to remit or reduce any punishment. The only task with which it was entrusted was to see that whatever the law provided for, was enforced.

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1. (a) *Sharh Qanoon-ul-Uqoobat* by Dr. Kamil Mersi and Saeed Mustafa P. 101.
   (b) *Al Qanoon-ul-Janai* by Ali Badwi P.102.
   (c) *Al Qanoon-ul-Janai* by Ahmed Safwat, P.77.

Later the French legislators were obliged to deviate from the doctrine in question. The reason for this was not that the principle it embodied was useless but that the institution entrusted with its application was incapable of discharging its function. The French law adopts the method of oath taking. Now the people who take oath are not guided by reason. They are rather swayed by emotions. In most cases they are apt to prove that the offender is innocent not because that he committed no crime but for fear that he would be awarded severe punishment which the court is not competent to reduce. They also know that the executive or the enforcing power too is unable to allow him any relief or reduce the punishment. In order to cope with this situation, the French law deviated from the doctrine of essentiality of provision and laid down two limits of each punishment, the higher and the lower, conferring on the court the power to award either of the two. Similarly two punishments were prescribed for each crime and the court was allowed the choice either to award both simultaneously or either of the two, whichever it deems fit.[1]

The principle that no act is punishable in the absence of a provision was borrowed by other modern laws from the French statute and passed through various stages of development under the pressure of necessity and was transformed to such an extent that the court was allowed the power to suspend the execution of a sentence and the executive authority was empowered to remit or reduce the punishment and to release the convict on probation. Thus unlimited powers came to be conferred in respect of punishment under the said doctrine.

Despite the great many changes the above doctrine has undergone, the experts of modern law think that it still holds good and that as long as the expanded scope of its application in harmony with the provisions of law and as long as the court exercises the powers conferred upon it by the legislatures the wider canvass of its application can not negative its legal character.

In course of time the application of the principle under discussion came to be slackened in respect of punishment, although

1. (a) *Sharh Qanoon-ul-Uqoobat* by Dr. Kamil Mersi and Dr. Saeed Mustafa p. 102.
   (b) *Al-Qanoon-ul-Janai,* by Ab Badvi, P 102.

it continued to be a recognized canon of determining the kinds of crime for a long time. But with the advent of the twentieth century, the principle as a whole was subjected to criticism. The legal experts objected that it was inadequate for social needs and that it was responsible for the loss of collective interest inasmuch as the provisions of criminal law did not always cover all matters prejudicial to social system and public interest. What, according to them, actually happened was that offenders succeeded in finding a way to elude the provisions of law and found themselves at liberty to do whatever they liked to the detriment of the individuals society and the security of social order. When the legislators added provisions to the statute for the prevention and prohibition of new offences stemming out of the offenders, delusive activities and posing a threat to public interest, the offenders managed to escape the effect of the new pro-visions and went on indulging in criminal activities with impunity.

This criticism led a number of major countries of the West to amend the doctrine in question. Thus under the German law the court was empowered to declare any act as a crime which, in the absence of a legal provision, it looked upon as harmful to the German society and to award punishment accordingly (See the German Criminal Law, Article 2). The Italian law conferred on the court the power under certain circumstances to make changes in the term of punishment and the procedure to carry out a sentence. The Soviet law also amended the said principle in 1926 and the Danish Law made a provision for awarding punishment for any act that could be dealt with on the analogy of an unlawful one. We do, however, mention the British Law in this context which had adopted a system of punishment similar to that of Islam.

Nor is this all. The scholars of criminal law started a general discussion of the principle in question notwithstanding the fact that it was considered above discussion. They closely examined to see how far it is needed by the society and to what extent it failed to fulfil the demands of social interest. It was at last included in the agenda of the world conference on legal punishments held in 1937. This conference only recommended to retain the doctrine of the essentiality of provision.

The pundits of modern law advocate the following views

in opposition to the doctrine under discussion in two aspects thereof the criminal and the punitive.

(a) All the unlawful acts should be broadly determined so as to include more than one case and leave no loophole for the culprit to elude it.

(b) Maximum, rather than minimum limit, of punishment should be provided for, and the court should be allowed extensive powers for the application of the penal provision. The scholars of criminal law go even a step further. They are of the opinion that the quantum of punishment should be left to the discretion of the court so that the purpose of the interpretation of penal provision may be served.[1]

(113) The Shariah Versus Modern Law

Evidently both the Shariah and the Modern Law uphold the principle that crimes and punishments presuppose provisions.

But the Shariah differs with the modern law on various points in respect of its application.

(a) In Consideration of Precedence.

The Shariah had been applying this doctrine for thirteen hundred years before it was incorporated in the Modern Law. Hence it originated with the Shariah and was subsequently adopted by the Modern Law.

(b) In Consideration of Broadness of its application

According to the Shariah the extension of the doctrine varies with the kinds of crimes to which it is applicable. For instance, the Shariah most subtly and accurately defines crimes in the case of offences deeply harmful to social system, peace and security. For crimes less harmful such as penal offences, the Shariah admits latitude in its application. In this case, it has rather laid down a collection of punishments allowing the court to award any of those punishments that it deems fit in consideration of the respective circumstances of crimes and capacities of offenders. And so far as crimes against public interest are concerned, it allows latitude

1. (a) *Al-Mausoo'ath'-ul-Janaia* Vol. P.552.
   (b) *Al Qanoon-ul-Janai* by Ali Badwi, P. 103.
   (c) Dr. Kamil Mersi and Dr. Saeed Mustafa, pp 102-104.

in the application of the said principle. It has contented itself with providing for such general injunctions as may comprehend all crimes prejudicial to social system and commonweal. In other words, the Shariah applies the doctrine of the essentiality of provision in three different ways and adopts a specific procedure for each category of crime which is suited thereto and is in harmony with public interest as well as individual experiences.

Modern laws apply this principle to all crimes indiscriminately. This misapplication has naturally produced undesired effects. In the beginning modern laws extended the principle to all crimes legally punishable in accordance with the first procedure the Shariah has reserved for dangerous crimes. As the result of the generalization of the applicability of the said principle in this fashion the courts and deponents giving statements on oath felt distressed over the severity of punishment for relatively less harmful crimes and in most cases endeavoured to get the accused acquitted somehow or other. In view of the undesirable result ensuing from the indiscriminate application of the doctrine of essentiality of provisions, the modern law adopted the second procedure laid down by the Shariah in respect of penal punishments but with the difference that the court's power to choose punishment and determine the quantum thereof was limited and the procedure was indiscriminately followed for all crimes in an identical way. This uniform application of the same procedure to all the crimes led to growing increase in the incidence of dangerous crimes every year, since the courts in exercise of their powers in respect of punishments and determination of the quantum thereof started awarding milder punishments. This procedure holds good in most of the modern laws to this day with a few exceptions (e.g. The German and the Danish laws) wherein the third procedure of the Islamic law has also been included. In other words both the second and third procedures of the Shariah have been incorporated in these modern laws.

Doubtless, the method adopted by the Shariah for the application of the doctrine is more subtle, flexible and more capable of fulfilling social needs and ensuring stability and security. It is also the remedy for all those ills which stem out of the indiscriminate extension of the said principles.

(c) In Consideration of Crime

In the determination of crime, the Shariah, as a rule, has taken care to make the provision pertaining thereto comprehensive and flexible enough to embrace all the possible cases excluding none. Although the comprehensiveness of the provision is to a certain extent confined to crimes entailing *hudood, qisas* and *diyat* yet it is inclusive of other crimes as well. So is the case, for instance, with crimes calling for penal punishments. Says Allah:—

"And spy not....." (49:12)

Again,

"Allah has allowed trading and forbidden usury."(2:275)

It has, moreover, been enjoined:

"Give full measure and full weight." (7:153)

Also,

"O' ye who believe! Betray not Allah and His Messenger nor knowingly betray your trust." (8:27)

Penal punishment to be awarded in public interest is so flexible and comprehensive that the act constituting crimes is not unlawful in itself but assumes criminal character by virtue of a specific quality thereof. The result that it cannot be ascertained whether or not an act is a crime until it is done.

Because of the flexibility of its injunctions the Shariah can be put into effect at all times and at all places and never lends itself to any amendment or change.

Modern laws, as opposed to the Shariah, determine crimes in relation to time and specify all the essential elements thereof. Consequently the crime included in a provision are delimited and every new situation necessitates amendment in the provision with the result that it is easy to deviate from such provisions and thus elude the law of punishment. The pundits of Modern law, therefore, are constrained to consider the question of making the provisions of criminal law comprehensive and flexible enough to embrace all the possible situations, and this is exactly what constitutes the basis of the Islamic Criminal Law.

(d) In Consideration of Punishments

The Shariah as a rule enjoins punishment in a manner that

it is unequivocally determined and the court need not propose any punishment of its own accord. The Shariah in this connection differentiates between crimes highly detrimental to social system and public interest and those relatively less detrimental. The first kind of crimes comprises those which entail *hudood, qisas* and *diyat* and the second kind includes all the categories of offences calling for penal punishments. As for the first kind, the Shariah has laid down one or more punishments and allows the court no choice in respect of its enforcement. If it is proved that the offender is guilty of any crime of this kind then the Court has 110 alternative but to pass the sentence accordingly. As regards the second kind of crimes, the Shariah has prescribed a collection of various punishments for all categories thereof, empowering the court to award one or more punishments out of them. Moreover, the Court is vested with the power to award higher or lower limit of a punishment with two limits or suspend the execution of a sentence or pass a sentence that it may deem fit in view of the circumstances of the offender and the offence.

The modern law, on the other hand, determines one punishment for each crime, which often comprises two limits, or two punishments both of which also consists of two limits, each empowering the court to award one or both the punishments so determined or award higher or lower limit of a two-fold punishments whichever it deems fit, or suspend the execution of a sentence on certain conditions or pass a sentence conditionally. Most of the modern laws also lay down the condition that the punishment should not be less than a minimum limit and that it should not be put off. This condition, under the modern law is kept in view in case of highly dangerous crimes.

It may be seen from the foregoing statement that modern laws provide for much limited judicial powers as compared to those conferred by the Shariah. If the modern law provides for a single punishment, the court has no alternative but to put it into effect and if it is allowed choice between two punishments, it may award either of them. But in most cases the court does not have the power to exceed the minimum limit of punishment prescribed in the statute. For most of the crimes the court is not vested with the power of suspending the execution of a sentence;

nor does it enjoy the power to deal with the offenders and prevent crimes to safeguard public interest.

Most modern legal experts are of the view that this situation cannot be overcome unless the court is vested with the powers of determining the nature and quantum of crimes. This is possible only when the court is allowed the power to choose any of the punishments provided for in a given set. If the above view of the scholars of Modern law is accepted, then this law would come closer to the Shariah. Under the modern laws the court does not have the power to suspend the execution of a sentence; nor can it go beyond the prescribed minimum of punishment. It has to content itself with the passing one or two sentences as provided for. These facts reveal that so far as the crimes entailing *hudood* and qisas are concerned, modern laws have partly incorporated the principle of Islamic Shariah.

It is of little consequence that under certain circumstances modern laws are diametrically opposed to the Islamic law; for till the end of the eighteenth century the man made law of the West was the very antitheisis of the Shariah. What matters is the fact that modern law began to follow the example of the Shariah towards the beginning of the nineteenth century incorporating its principles and applying its concepts. What the legal pundits now propose is the same thing on which the Shariah rests. This should serve as an eye opener to scholars and intellectuals.

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THE ISLAMIC SOURCES OF CRIMINAL LAW

(114) All the jurists of Islam agree that there are four sources of Islamic law

(1) The Holy Quran
(2) The Sunnah
(3) Consensus and
(4) Analogy

The jurists treat the sources of Islamic law as the arguments by which the injunctions of Shariah are deduced and they are agreed that if an injunction is established by any of the four arguments it becomes effective.

The four arguments and the procedure of reasoning based upon them have been arranged in the above order of importance. Thus they have placed the Holy Quran at the top as the first source of Islamic Shariah, Sunnah as the second, consensus as the third and analogy as the fourth source. Now, if no injunction is to be found in the Holy Quran in respect of a particular problem, then recourse will be had to the *Sunnah*. If the *Sunnah* provides no guidance either, consensus of the *Ulema* will be sought. Should *Ulema* fail to arrive at consensus, conclusion will be drawn on the basis of analogy.

Apart from these, there are some other sources of the Islamic Shariah. They are, however, controversial. Some jurists treat them as the sources of Islamic law and the injunctions established on their basis as binding, while others do not subscribe to this view. These controversial sources are asunder:-

(1) Istehsan (Equality)
(2) Istislah (Link)
(3) Maslehat mursilah (public good or commonweal
(4) Urf.
(5) Divine Laws preceding Islamic Shariah
(6) The Cult of Sahabi.

(115) The Sources of the Criminal Law of Islam

Decisions in respect of criminal cases are based on the same sources of Islamic Shariah as have been stated above except that some of them are unanimously accepted by the jurists while others are controversial.

The Islamic criminal law by which crimes and punishments are established owes itself to four sources. The jurists are unanimous on three of these sources viz.; the Holy Quran, Sunnah and the consensus, while they differ on the fourth namely, analogy. Some of them as a source of Shariah but others do not recognise it as a source of establishing crimes and punishments.

The vital difference between the Quran and the Sunnah on the one hand and the remaining two sources has to be taken into consideration, for the Quran and Sunnah constitute the basis of Islamic Shariah, and it is these two sources which contain the injunctions validating general principles whereas the remaining two sources neither constitute the basis of any new law, nor do they lend legitimacy to any view principles. In fact, these sources are instrumental in drawing corollaries from the Quran and the Sunnah consistent with their injunctions and in no way repugnant to them.

First Source - Al Quran

(116) The Quran is the Book of God wholly consisting of divine revelations. It begins with the *Surah 'Al fatiha'*, and ends with the *Surah 'Annas'*

(117) The Quranic Injunctions are Unquestionable and Authentic

The Holy Quran has come down to us through manuscripts and recitations from generation to generation. Owing to this continuity, it is quite intelligible that the Book is unquestionably authentic and comprises a verbatim copy of the Word of God. Hence the injunctions contained in it are not open to question. This is because, to repeat, to repeat again, it is absolutely certain that it has been handed down to us in exactly the same form as it was originally revealed. This continuity bears testimony to its authenticity. There was a group of scribes who heard the word of

God from the Holy Prophet (S.A.W.) and wrote it down. A large number of his Companions committed it to memory. Now consensus of so large a number of people on falsehood is impossible. From numerous Companions of the Prophet (S.A.W.) innumerable people heard it and learnt it by heart with such an accuracy that despite long distances and variety of nations not a single letter of the Holy Quran could be changed or replaced.

(118) Although all the Quranic injunctions are final, but their meanings are not always unequivocal. However, if an injunction is unequivocal leaving no room for interpretation, then it is positive. For instance, the following verse of the Holy Quran contains an injunction that admits of no interpretation:

> "And those who accuse honourable women but bring not four witnesses, scourage them with eighty stripes and never afterwards accept their testimony." (24:4)

Here the meanings of the words 'eighty' and "never afterwards" are equivocal. However if the meanings of an injunction are amenable to construction, it is ambigous. An example of such injunctions is provided by the following verse:

> "Women who are divorced shall wait keeping themselves apart three monthly courses." (2:228)

Here the word courses implies menstrual periods as well as period of cleanliness. Thus the word is ambiguous and open to more than one constructions, for it may either mean menstruation or cleanliness.

(119) Finality of Quranic Injunctions

There are no two opinions among the Muslims about the fact that the Holy Quran constitutes divine revelations and enjoins obedience to Allah on every Muslim. Thus the Quran is the final word of God, For every Muslim man and woman its injunctions are binding upon them all.

(120) The Quranic injunctions are applicable to both the mundane life and the life hereafter.

There are two kinds of injunctions:those intended for the establishment of faith and those which pertain to the system of government and national integration. The first kind of injunctions

comprise commandments as to belief and prayers; while the second constitute instructions about problems relating to worldly matters, punishments, personal affairs and constitutional as well as administrative issues.

The numerous and multifarious Quranic injunctions are designed to promote man's welfare in this world and improve his prospects in the Hereafter. From this it follows that there are two sides to every human act, the one involving his worldly life and the other the life after-death. Every act whether it pertains to worship or the conduct of civilized life produces two fold effect. On the one hand, this effect is manifest the worldly affairs; for instance it may result in the fulfillment of a responsibility, appropriation of something or justification of what is unlawful, acquisition or loss of a right, incurrence of a punishment, shouldering of some responsibility etc. On the other hand, the same act has bearing on the life hereafter as well, whether the person concerned deserves either punishment or reward. Since the Shariah aims at fostering the well being of man, both in this world and the Hereafter, it must be treated as an indivisible unit. hence its purpose will not be served if some components of it are accepted and others rejected. Moreover; there is no other law in the world which operates in the same manner as the Islamic Shariah does. Therefore, it cannot be treated on the analogy of any other law.

If we carefully study the injunctions contained in the following verses of the Holy Quran, we will realize the fact that two different punishments have been laid down for the violation of each injunction, one of them being worldly and the other pertaining to life after death. For example, the Holy Quran declares homicide unlawful and states in clear terms that:

> "And slay not the life which Allah hath forbidden save with right." (17:33)

Two punishments have been prescribed for homicide; one worldly and the other supramundane. Says Allah:—

> "'O' ye who believe Retaliation is prescribed for you in the matter of the murdered, the freeman for the free-man, and slave for the slave, and the female for the female. And for him who is forgivenly his (injured) brother, prosecution

according to usage and payment unto him in kindness. This is an alleviation and a mercy from your Lord. He who transgresseth after this, will have a painful doom." (2:178)

> "Whoso slayeth a believer of set purpose, his reward is Hell for ever. Allah is worth against him and He hath cursed him and prepared for him an unlawful doom." (4:93)

And this also bears it out that the worldly punishment for transgression is retaliation or *qisas*.

Punishments prescribed for robbery and bloodshed are slaying, amputation of limbs and punishment. These are all worldly punishments, while painful doom is the punishment reserved for the Hereafter. Says Allah:—

> "The only reward for those who make war upon Allah and his Messenger and strive after corruption in the land will be that they will be killed or crucified or have their hands and feet on alternate sides cut off, or will be expelled out of the land. Such will be their degradation in the world and in the Hereafter, theirs will be an awful-doom. (5:33)

Punishment for the thief in this world is amputation of hands. But he will have to suffer torment in the Hereafter too.

> "As for the thief both male and female, cut off their hands. It is the reward of their own deeds, an exemplary punishment from Allah. Allah is Mighty, Wise. But whoso repentanth after his wrong doing and amendeth, lo! Allah will relent towards him. Lo! Allah is Forgiving Merciful."(5:38-39)

Here repentance means repentance after undergoing the prescribed punishment. Obviously, repentance after punishment is designed to be free of accountability in the Here-after.

Promotion of evil and calumination of chaste women entails punishments in this world as well as in the Hereafter Says Allah:

> "Lo those who love that slander should be spread concerning those who believe, theirs will be a painful punishment in the world and the Hereafter." (24.19)

Again,

> "Lo! As for those who traduce virtuous, believing women (who are) careless, cursed are they in the world and the Hereafter. Theirs will be an awful doom. On the day when

their tongues and their hands and their feet testify against them as to what they used to do. On that day Allah will pay them their just due and they will know that Allah, He is the manifest Truth." (24:23-25)

Adultery also entails both mundane and supramundane punishments:

"The adulterer and the adulteress scoursgeye, each one of them with a hundred stripes." (24:2)

Again,

"And those who cry not unto any other God along with Allah, nor take the life which Allah bath forbidden save (in course) of justice, nor commit adultery and whoso doeth this shall pay the penalty; the doom will be doubled for him on the Day of Resurrection, and he will abide therein disdained for ever; save him who repentanth and believeth righteous work; as for such Allah will change their evil deeds to good deeds. Allah is ever forgiving, Merciful." (25:68-70)

It has been said elsewhere:—

"Lo! Those who devour the wealth of orphans wrongfully, they do but swallow fire into their bellies and they will be exposed to burning flames." (4:10)

Usury also entails two punishments; the mundane and the supramundane. Says Allah:—

"Those who swallow usury cannot rise up save as he ariseth whom the devil has prostrated by (his) touch. That is because they say:Trade is just like usury; whereas Allah permitteth trading and forbiddeth usury. He unto whom an admonition from his Lord cometh, and he refraineth in obedience thereto, he shall keep the profits of that which is past, and his affair henceforth is with Allah. As for him who returneth to (usury), such are rightful owners of the Fire. They will abide therein." (2:275)

Closing of mosques is a crime involving two fold punishment- a punishment in this world as well as chastisement in the Hereafter

"And whoso doth greater wrong than he who forbiddeth the approach to the sanctuaries of Allah, lest his name should be mentioned therein, and striveth for the ruin As

for such, it was never meant that they should enter them except in fear; Theirs in the world is ignominy and theirs in the Hereafter is an awful doom." (2:114)

Again two punishments have been prescribed for fleeing from the battlefield:

"O! ye believe! When ye meet those who disbelieve in battle, turn not your backs to them. Whoso on that day turneth his back to them, unless manoeuvring for battle or intent to join a company, he truly hath incurred wrath from Allah, and his habitation will be hell, a hopeless journey's end. (8:15—16)

Apostasy too involves a temporal punishment as well as chastisement in life after death.

Says Allah:

"And whoso becometh a renegade and dieth in his disbelief such are they whose works have fallen both in the world and the Hereafter. Such are rightful owners of fire:They will abide therein." (2:217)

Thus we find an injunction among the provision of the Shariah wherein a temporal punishment is not coupled with prospective chastisement in the Hereafter. However, if there does exist any such provision it is subject to the contents of the following verses:—

"Is he who is a believer like unto him who is an evil liver? They are not alike. But as far those who believe and do good works for them are the gardens of retreat for what they used to do. And for them who do evil, their retreat is the fire. Whenever they desire to issue forth from thence they are brought back thither. Unto them it is said:Taste the torments of the Fire which ye used to deny." (32:18-20)

Again,

"Whoso obeyth Allah and His Messenger. He will make him enter gardens underneath which rivers flow, where such will dwell for ever. That will be the great success. And whose disobeyth Allah and His Messeneger and transgresseth His limits, He will make him enter fire where such will dwell for ever; his will be a shameful doom." (4:13:14)

In short, there do exist such unequivocal general provisions and the few of them we have cited above would suffice to establish our argument. The emphasis of the Islamic law on both this world and the Hereafter is not without reason. In fact, the very basis of this law calls for such emphasis. According to the Shariah this world is only an ephemeral place of trial, whereas the Hereafter is the eternal abode; man is responsible for his deeds in this world and deserves reward for them in the life hereafter; and if he does good deeds, he will be rewarded accordingly and the other way about. Thus, according to the Islamic conception of law temporal punishment does not exclude supramundane chastisement. Hence the only way to get the latter punishment remitted is to repent and get back to the life of submission and obedience to Allah.

(121) Injunctions of Shariah do not admit of partial acceptance.

The provisions of the Islamic law do not admit of partial acknowledgement and disallow separation of some parts for purposes of compliance from other parts; for, as has already been mentioned, such partial treatment of its injunctions defeats the very purpose of Shariah. Some of the provisions of Shariah are explicit on this point. They clearly forbid putting into practice some of its injunctions while rejecting others, just as it disapproves of believing certain things and disbelieving others. Profession of faith will be treated as genuine and complete only when we believe all such things as are enjoined by the Shariah. If anyone does not believe all of them, he will be like those spoken of in the following verse:—

"Believe ye in part of the scripture and disbelieve in part thereof? And what is the reward of those who do some ignominy in the life of the world and on the Day of resurrection they will be consigned to the most grievous doom." (2:85)

There is many an injunction that forbid partial implementation of the Shariah. For instance,

"Those who hide the proofs and the guidance which we revealed after we had made it clear in the scripture; such are accursed of Allah and accursed of those who have the power to curse, except such of them as repeat and make

manifest (the truth). There it is toward whom I relent. I am the Relenting and the Merciful." (2:159-160)

Here the word *'yaktamoon'* implies that some injunctions are to be complied with, and others are to be abandoned and that some injunctions are to be accepted and others are to be rejected. Similarly Allah says:—

"lo! Those who hide aught of the scripture which Allah hath revealed and purchase a small gain therewith, they eat into their bellies nothing else than fire. Allah will not speak to them on the Day of Resurrection, nor will He make them grow. This will be a painful doom. Those are they who purchase error at the price of guidance and torment at the price of pardon. How constant are they in their strife to reach the Fire." (2:174-175)

Again,

"Seek they other than the religion of Allah, when unto him submitteth whosoever is in the heavens and the earth, willingly or unwillingly and unto Him they will be returned." (3:83)

And whoso seeketh as religion other than the surrender (to Allah) it will not be accepted for him and he will be a loser in the Hereafter. (3:187)

More verses to the same effect are as under:—

"O Messenger! Let not them grieve thee who vie one with another in the race of disbelief of such as say with their mouth:"We believe" but their hearts believe not, and of the Jews listeners for the sake of falsehood, listeners on behalf of other folk who come not unto thee, changing words from their context and saying:If this be given unto you, receive it but if this be not given unto you, their beware! He whom Allah doometh unto sin thou (by thine efforts) will avail him not against Allah. Those are they for whom the Will of Allah is that he cleanse not their hearts. Theirs in the world will be ignominy, and in the Hereafter an awful doom". (5:41)

Again, Allah says:—

"So fear not man but fear me. And barter not my revelations

for a little gain. Whoso judgeth not by that which Allah hath revealed such are misbehaves." (5:44)

Once again,

"Lo! Those who disbelieve in Allah and His Messenger and seek to make distinction between Allah and His Messengers and say:We believe in some and disbelieve in others and seek to choose a way in between." (4:150)

Another verse to the same effect:—

'An unto thee We have revealed the scripture with the truth, confirming whatever scriptures were before it and a watcher over them. So judge between the people by that which Allah hath revealed and follow not their desires away from the truth which hath come unto thee. For each we have appointed a divine law and a traced out way. Had Allah Willed He could have made you one community. But that He may try you by that which He hath given you. He hath made you as ye are. So vie one with another in good works. Unto Allah ye will all return, and He will then inform you of that wherein ye differ. So judge between them by that which Allah hath revealed and follow not their desires but beware of them lest they should reduce thee from some part of that which Allah hath revealed unto thee. And if they turn away, then know that Allah's Will is to smite them for some sin of theirs. Lo! Many of mankind are evil-livers. Is it a judgement of the time of pagan ignorance that they are seeking? Who is better than Allah for judgement to a people who have certainly (in their belief)? (5:48:50)

Another Verse still,

'O' Messenger ! Make known that which hath been revealed unto thee from thy Lord, for if thou do it not, thou will not have conveyed His Message. Allah will protect thee from mankind Lo! Allah guideth not the disbelieving folk" Say 'O' People of the Scripture! Ye have naught (of guidance) till ye observe the Torah and the Gospel and that which was revealed unto you from your Lord. That which is revealed unto thee Muhammad from Thy Lord is certain to increase the contumacy and disbelief of many of them, But grieve not for the disbelieving folk." (5:67-68)

Get another Verse

"We sent no messenger save that he should be obeyed by Allah's leave. And if they had wronged themselves, they had but come unto thee and asked forgiveness of Allah, and asked forgiveness of the Messenger they would have found Allah Forgiving, Merciful. But by thy Lord, they will not believe (in truth) until they make thee judge of what is in dispute between them and find within themselves no dislike of that which thou decidest and submit with full submission." (4:64-65)

(122) The Distinguishing Characteristics of the Shariah

There is many a matter wherein the Shariah differs from the man-made law. In the first place its injunctions are meant for the world as well as the Hereafter. That is why the people who believe in it act on its injunctions in both the overt and the inner aspects of their life and try to line up to them through thick and thin, since they believe that adherence to those injunctions are nothing short of worship and are a means of coming closer to Allah and deserving His reward. The result is that a person who acts in conformity with the Shariah will abstain from committing an offence for fear of incurring Allah's displeasure even if he is in a position to elude the provisions of criminal law.

In the second place the Shariah enjoins upon its followers to imbibe cardinal virtues; for if they are imbibed with them, they will seldom commit crimes. Moreover, they are always mindful that Allah is constantly watching them from above and is fully aware of all that they do. They believe that they can manage to conceal their deeds from mankind, but not from Allah, the Omnipresent. This awareness results in the reduction of the incidence of crimes and is conducive to the maintenance of peace and security as well as safeguarding social order and public interest. Contrary to the Shariah, there is nothing in man-made laws to motivate them to obedience and submission. In the case of these laws obedience is proportional to the magnitude of the risk of liability to prosecution. The result is that if anyone can commit a crime by eluding the law in operation, no moral or religious inhibition can prevent him from committing an offence. Hence

in countries where man-made laws are in force, the incidence of crimes and depravity is on the increase and there is particularly growing tendency of crimes among the intelligentsia, since this class of society with its moral depravity has greater means to elude the law.

The Islamic law makes it incumbent upon its followers to have a firm faith in its being divine revelation and in the Islamic order as a system characterised by abundance of justice and equality. That is the reason why the Muslims do not give it up and adopt some other law instead. A true Muslim would never accept any system (such as socialism) repugnant to Islam. On the contrary, the nations governed by manmade laws gauge every system by the yardstick of material interest. They run after every new system seeking material gains. They would not hesitate adopting any thing that may appear better than their own system and opens up to them vistas of increasing gains, power and honour. That is why such nations do not cling to any one system.

In other words, the Shariah is permanent and immutable because it succeeds in bringing about harmony between this world and the Hereafter inculcating in its followers unshakeable faith in its veracity and cagency. The Muslims are imbued with the spirit of obedience and submission as well as with the cardinal virtues of which the people following man-made laws are devoid, no matter however stable and strong those laws may be and however superior the methods adopted to enforce them.

SECOND SOURCE

THE SUNNAH

(123) Any saying or action of the Holy Prophet (S.A.W.) or anything approved by him as related in traditions imputed to him constitutes Sunnah. Thus there are three kinds of Sunnah:

(a) The Holy Prophet's sayings
(b) His Practice and
(c) His approbation.

We discuss them one by one

(a) The Prophet's Sayings

His sayings consist of all the observations made by him on any occasion as for example:

"Killing of a Muslim is unlawful unless three conditions are present, viz., renunciation of faith after professing it; adultery after marriage and unwarranted murder.

Again,

"If a person is slain, his or her heirs are allowed the choice between *qisas* and *diyat.*"

Once again,

"Adultery by an unmarried man with an unmarried woman entails the punishment of a hundred stripes coupled with banishment for a period of one year."

Other examples are

"Stealing of unplucked fruit or a thing hidden on a bill does not entail imputation of hand. However, if the stolen thing is placed in an enclosure where the cattle are kept or in a barn and the value thereof is equal to that of a shield (or equal to the quantity of a stolen thing presented for the amputation of hand), then the hand of the thief shall be cut off."

"Whoever drinks liquor, scourge him and if he drinks again, scourge him again."

(b) Prophet's Practice

The Prophet's practice consist of his actions. For instance, sentencing of an offender by him after his pleading guilty of adultery, sentencing of a thief to amputation of the right hand and passing judgement on evidence of witness and deposition on oath by the plaintiff.

(c) Prophet's Approbation

Words and deeds of the Prophet's companions reported to have been endorsed by the Prophet (S.A.W.) by silence, by refraining from disapproval or by approbation have become as good as the words and deeds of the Prophet (S.A.W.) himself. For example, when the Prophet (S.A.W.) wanted to send Hazrat Moaz bin Jabal (R.A.A.) to Yaman, he asked him," How would you decide a case?" Hazrat Moaz (R.A.A.) replied, "I would decide it in accordance with the Quran and the Sunnah. If 1 could not find solution to a problem in the Holy Quran, then I will decide it in the light of the Sunnah. However, If the Sunnah provides no guidance either, then I will decide it at my discretion." The Prophet (S .A.W.) endorsed the way Hazrat Moaz wanted to decide a case, He said, "Praise be to Allah who graced the Apostle's emissary with such guidance as has pleased the Apostle."

(124) The Place of Sunnah vis-a-vis the Holy Quran

The Quran is the fundamental and the original source of the Islamic Law. The Sunnah comes after it. It is the second source and is as such only next in importance to the Quran.

There are three legal aspects of the Sunnah:—

(1) It supports or stresses a Quranic injunction. In this case the injunction concerned refers both to the Quran and the Sunnah; for instance, prohibition of killing without justification, giving false evidence and, stealing. All the assertive and prohibitive injunctions found in the Quran as well as the *Sunnah* fall under this head.

(2) It consists of elucidation and interpretation of broad Quranic injunction or qualifies absolute Quranic injunctions.

(3) The Sunnah specifies Quranic injunctions. Its interpretation, qualification and specification are designed to

elucidate and explain such injunctions as Allah has bestowed upon the Holy Prophet (S.A.W.) the right to elucidate the verses and injunctions of the Quran says Allah:—

> "And We have revealed unto thee the remembrance that thou mayst explain to mankind that which have been revealed for them." (27:44)

For instance, The Sunnah lays down the details of saying Prayers, payment of *Zakat* and performance of *Hajj,* as these have been enjoined in the Holy Quran without specifying the procedure of prayer, the quantity of *Zakat* and the ways of performing *Hajj.*

At most places the Sunnah qualifies the Quranic injunctions and delimits their scope. For instance, the Quran allows trade and disallows usury. The Sunnah goes a step forward and specifies the forms of trade under this injunction. The Quran forbids eating of dead animal and drinking of blood. But the Sunnah qualifies the application of this injunction and identifies the kind of dead animal and blood exempted from this taboo. The Quran, again specifies the off-springs entitled to inheritance. But the Sunnah annuls the title of a heir guilty of murder. The Quran enjoins the amputation of a thief's hand. But the Sunnah qualifies this injunction by laying down that the value of stolen thing must be equal to one fourth of a *dinar* and that it should have been kept in a safe place. It is then, and then only, that the punishment of amputation of hand will operate.

(4) The Sunnah provides for an injunction not to be found in the Holy Quran. Hence any provision of the Shariah that has not emanated from the Quran must be taken to have originated in the Sunnah. For instance, the Prophet (S.A.W.) said:—

> "Marriage of a man with his wife's paternal aunt or wife of her paternal uncle is unlawful."
>
> Or take for example and Holy Prophet's saying forbidding the use of gold and silk:
>
> "Use of both is *tabooed* for menfolk of my *Ummah* and authorised for the women folk."

Again,

> "Relationship established by sharing the milk of the same woman's breast makes unlawful all those relationships tabooed by blood relationship."

(125) The kinds of Sunnah according to Tradition:—

(1) *Sunnat-e-Mutawaterah* or successively reported *Sunnah.*
(2) *Sunnat-e-Mashoorah* the well-known *Sunnah* and
(3) *Sunnat-e-Ahad* or the *Sunnah* reported by one or a few narrators

(1) Sunnat-e-Mutawaterah

This consists of Traditions coming down from the Holy Prophet (S.A.W.) as narrated by such a great number of his companions that owing to their multiplicity it is impossible to agree on such *sunnats* being false. Innumerable other individuals have successively reported them in their turn, and in this way they have been handed down to us as verified by the reporters belonging to all the generations, each generation consisting of so many narrators that it is impossible to agree on their being false. Under this category of *Sunnat* fall prayer, fasting and the procedure of religious practices learnt from the Prophet (S.A.W.) by a large number of his companions and from them a host of other Muslims so much so that despite the yaning chasms of time and space, there have been no two opinions about them.

(2) The well-known Sunnah *Sunnat-e-Mashoorah* is the Tradition of the Holy Prophet (S.A.W.) narrated by one or a few of his companions less in number than those reporting *Sunnat-e-Mutawaterah* (successively reported Sunnah) and then handed down intact from generation to generation by successive narrators less in number in each generation than those reporting Sunnat-e-Mutawaterah. Such traditions include those narrated by Hazrat 'Umar bin Khattab (R.A.A.), Ibn-e-Masood and others.

(3) *Sunnat-e-Ahad (Sunnah* reported by one or few reporters) comprise such Traditions as have been narrated directly from the Holy Prophet (S.A.W.) by one or a few of his companions less in number than those narrating the successively reported traditions and handed down from generation to generation by one or a few narrators less in number in each generation than those narrating the successively reported traditions. Most of the traditions fall under this head.

(126) Are Sunnats Unquestionable or Doubtful?

It is beyond doubt that the *Mutawaterah Sunnats* have come down from the Holy Prophets, (S.A.W.) since the narration of the same thing repeatedly and ceaselessly testifies to the truthfulness of the narrators. The veracity of the well-known tradition is unquestionable in so far as it has come down from one or a few Companions of the Holy Prophet (S.A.W.) but its emanation from the Prophet (S.A.W himself is uncertain; for the number of those narrating such a tradition from the Prophet (S.A.W.) falls short of the requisite number for continuity while the number of those reporting it from the Prophet's companions is large enough to include it in the ambit of continuity. But the emanating of *Sunnat-e-Ahad* from the Prophet (S.A.W.) is doubtful as has been narrated by a minimum number of reporters.

If the *Sunnats* are not amenable to any construction, they are evident; but if they are open to construction, they are ambiguous.

(127) The Finality of Sunnat

All those traditions of the Holy Prophet (S.A.W.) including his sayings, actions and statements which aim at lawmaking and which have come down to us through authentic sources are undisputedly final and characterized by the highest degree of probability and constitute the unquestionable and imperative legal source for the Muslims, whether their emanation from the Holy Prophet (S.A.W.) is unmistakable or open to question. The successive traditions are binding because they are unmistakably traceable to the Holy Prophet; (S.A.W.) but the well known *sunnats* and the *sunnats* reported by minimum number of narrators are also binding because they have been narrated by persons possessing the qualities of fairness and authenticity to the highest degree.

In short, the provisions of Sunnah are imperative and binding because they have been declared to be so in the Holy Quran. Says Allah:

> "O! Ye who believe! Obey Allah and obey the Messenger and those of you who are in authority, and if ye have a dispute concerning any matter refer it to Allah and the Messenger." (4:59)
>
> "And if any tidings, whether of safety or fear, come unto

them, they noise it abroad, whereas if they had referred it to the Messenger and such of them as are in authority those among them who are able to think out the matter would have known it." (4:83)

"Whoso obeyth the Messenger obeyth Allah." (4:80)

"We sent no Messenger save that he should be obeyed by Allah's leave." (4:64)

There is another verse to the same effect:—

"Say:Obey Allah and the Messenger." (3:32)

Yet another:—

"Say, (O' Muhammad (S.A.W.) to mankind) if you love Allah, follow me; Allah will love you." (3:31)

Still another:

He it is who hath made you regents in the earth so he who disbelieveth his disbelief be on his own head. Their disbelief increaseth, for the disbelievers, in their Lord's sight, naught save abhorance. Their, disbelief increaseth for the disbelievers naught save loss. (35:39)

Again,

"And whatsoever the Messenger giveth you, take it. And whatsoever he forbiddeth, abstain from it." (59:7)

In short, according to the Quranic injunctions, the *sunnat* is binding law. During the Prophet's life time and thereafter all his companions agreed on its being obligatory. They put into effect all his edicts during his life-time and translated them into practice themselves. They treated what was allowed by the Prophet (S.A.W.) as lawful and what was disallowed as unlawful. And after his demise whenever they faced any problem for which no provision existed in the Holy Quran, they tried to find out the relevant Tradition to solve it. The first Caliph Hazrat Abu Bakr (R.A.A.) used to enquire if anyone remembered a tradition relating to a problem which he himself had forgotten. So also was the case with Hazrat 'Umar and other companions of the Prophet (S.A.W.) as well as their successors.

(128) Do the Sayings and Actions of Holy Prophet(S.A.W.) constitute Law?

There are various kinds of the Holy Prophet's sayings and

actions. Acts such as getting up, sitting, eating and drinking were done by him as a human being. Such acts do not enjoy the status of law, since they do not form a part of his functions as a Prophet (S.A.W.). They were simply the fulfillment of the demands of human nature.

Some other acts were the expression of his characteristics. No body else had any share in those acts. They, too, do not constitute law. They may be regarded as his idiosyncrasies. The example of such acts are his marrying more than four women, entering the House of Allah without observing the relevant *taboo* of *Ahram* and keeping fast ceaselessly etc. He did some acts on the basis of his personal experience in worldly affairs, for instance trade, agriculture and military strategy. These acts also do not enjoy the status of law, for they ensued from his personal experience. The Prophet (S.A.W.) himself did not treat them as law. This is borne out by the fact that he advised his companions to graft dates but the trees did not bear a good crop. The Prophet (S.A.W.) then withdrew his advice and said, "you know your worldly affairs better than I." Again during the *battle of Badr* the Prophet (S.A.W.) wanted to array his troops at a certain point. One of the companions asked him if it was divine instruction to array the troops at that point or it was his own strategy. The Prophet (S.A.W.) answered that it was his own plan. The companion then ventured to consul him that for such and such reasons it was not advisable to deploy the troops at the point chosen by him. The Prophet (S.A.W.) accepted his advice.

But all those sayings and actions of the Holy Prophet (S.A.W.) designed to elucidate divine injunctions to teach and to guide constitute law in themselves. The examples of such sayings and actions are as follows

"You should offer prayer exactly the same way you see me do."

or

"Learn your rites from or me."

Again, the Prophet's edict to cut off the right hand of the thief from the ankle is the elucidation of the divine injunction:

"Amputate the thief's hand."

The Prophet's edict to bury a convict stoned to death and offer prayers over his body in the normal way is another example that may be cited in the present context. When questioned about Hazrat Mu'az the Prophet (S.A.W.) said, "dispose of him as you dispose of all your dead.

Other examples are as follows:—

When the Prophet (S.A.W.) intended to enforce the punishment of *'hud'* he chose a whip that was neither too hard nor too soft."

When Hazrat Umme Salma asked him about kissing one's wife in fasting, the Prophet (S.A.W.) replied:"I want to let you people know that I too kiss (my wife) in fasting."

Again, when she enquired about his instructions as to wetting of hair while taking one's bath, the Prophet (S.A.W.) said, "For me it is sufficient to pour three handfuls of water over my head."

Controversy arose among the companions of the Holy Prophet (S.A.W.) as to ablutionary bath without emmissio seminis (discharge) in sexual intercourse. Hazrat 'Umar (R.A.A.) called on Hazrat Aisha to seek guidance in the matter. She told him that both the Prophet (S.A.W.) and herself took bath in such an event. Consequently Hazrat 'Umar issued instructions to the believers to follow the Prophet's tradition as narrated by Hazrat Aisha (R.A.A.).

Hazrat 'Umar (R.A.A.) used to kiss the black stone while moving around the House of Allah at Mecca but, at the same time, apostrophized to it saying, "I know that thou art no more than a stone incapable of doing good or harm to anyone. Had I not seen the Holy Prophet (S.A.W.) kiss thee I would never have kissed thee."

The foregoing statement bears it out that had the Prophet's sayings and actions not been binding, his companions would not have acted upon them meticulously.

THE THIRD SOURCE

CONSENSUS

(129) Definition of Consensus

Consensus means agreement of all the jurists of Islam on any provision of the Shariah at any time after the demise of the Prophet (S.A.W.).

(130) The Finality of Consensus

If all the Jurists of Islam agreed on a provision relating to a particular matter at one and the same or at different times, the consensus arrived at would be binding on all the believers and would be treated as the final and positive proof of the provision. But if a majority of the jurists and not all of them are agreed, then such a consensus would be binding on the general run of the people, while the scholars may hold different views till such time that it is declared by the head of the state or the man in authority as binding on all. In this case it would be incumbent upon every one to abide thereby.

(131) The Legal Basis of Consensus

The springs of Consensus lie in the Quran and the *Sunnah*. Next to these comes *ijtehad*. But *ijtehad* is not based on abstract authority. It springs, in the absence of an explicit provision of the Quran or the Sunnah, from the spirit and the fundamental principle of the Shariah. The consensus of jurists on a particular provision is unquestionable proof of its being in harmony with the basic elements and the spirit of Shariah. The very fact that jurists belonging to different regions, environments and schools bears it out that what they are agreed on is truth.

The Quran and the Sunnah have given to consensus the status of binding and obligatory law and as such it owes it origin to the Quran and Sunnah, Says Allah:—

"O! Ye who believe! Obey Allah and obey the Messenger and those of you who are in authority." (4:59)

In this verse the pharse, "those in authority" is unanimously taken to mean officers and scholars. Everyone of them is the authority in his own sphere. If the scholars are agreed on a provision, the Quran enjoins that they ought to be obeyed.

Similarly:

> "If they had referred it to the Messenger and such of them as are in authority, those among them who are able to think out the matter, would have known it." (4:83)

In the foregoing verse the people in authority means the *Ulema.*

According to the Sunnah the opinion of the community is free of error and Allah looks upon the conclusion unanimously arrived at as good. Hence the Prophet's saying:

> "The people of my *Ummah* will never agree on error."

Also,

> "Allah does not lead my *Ummah* to a consensus on misguidance,"

Again,

> "Any matter preferred by all the Muslims will be treated as preferable by Allah."

(132) Consensus is the source of Statutes, Regulations and Resolutions.

The criminal laws, in general, comprise provisions passed by the legislature, whatever the form of government may be. In Egypt these provisions become law after being adopted by the parliament. An act promulgated by the king without the approval of the parliament is known as an 'Ordinance' vide article 41 of the Egyptian constitution. In either case ratification by the parliament is essential. When an act is ratified by the parliament, the king promulgates it and thereafter it becomes applicable to all the individuals. In other words, a sort of incomplete consensus has come to be the source of the Egyptian law. It is incomplete because the provisions comprising the statue has the approval of only the majority. But even these provisions, approved by the majority are not effective. They come into force because they are promulgated by the man in authority. Thus consensus in this

context constitutes a doubtful ground and not unquestionable ground. The rules enforced by the administrative and local bodies for the execution of the law are called regulations and resolutions. These bodies are empowered under the law to enforce such regulations. The validity of these regulations owes its origin to the same incomplete consensus as comprises the source of law itself. Their effectiveness, too, springs from the consent of the man in authority and to the fact that the authority has conferred on the above bodies the power to enforce them.

(133) The Position of Laws, Regulations and Resolutions in the Shariah

According to the Shariah acts, regulations and resolutions are complement of Islamic law, since the Shariah confers the power of framing laws on the person in authority in matters directly related to public or individual interests or those indirectly pertaining to whatever benefits the public or the individuals. It allows the legal authority of every Islamic country to award, if circumstances so require, punishments for lawful acts or pardon a crime or reduce the prescribed punishment[1] thereof, or limit the powers of the court regarding a crime and extend its powers in the public interest.

All the acts, regulations and resolutions enforced by legal authority are valid and binding provided that no regulation is repugnant to the provisions of the Shariah or the fundamental principles and the underlying spirit thereof. If repugnant, they will be null and void as has already been explained in the case of *'faskh.'*

(134) Giving status of law to consensus by Shariah is not unparalleled.

Some people labour under the misapprehension that the Islamic Shariah has taken unparallelled position by giving status of law to consensus.

The truth of the matter is that in non-Islamic countries too, collective opinion forms the basis of interpretation and application of all the laws in force. In these countries no law is promulgated

1. Also see article 99 and subsequent articles.

unless the legislative bodies are in agreement. And a legal doctrine agreed upon by majority of legal experts and judges assume the position of an operative force less than law, whose springs lie in the incomplete consensus referred to above. If judges differ on any matter, the law would prefer the verdict of majority, which accordingly becomes binding. Thus if the court consists of two judges, the decision arrived at by both of them will be valid. If the High Courts differ on the implications of a legal principle or a controversy arises among them over the interpretation of some legal provisions the final verdict will be passed in the light of the opinion held by the majority of the judges of all the courts. In other words, modern laws do not only recognize the validity of consensus, but also treat the incomplete consensus arrived at by the majority as a source of enactment of laws and interpretation as well as application thereof.

THE FOURTH SOURCE ANALOGY

(135) Definition of Analogy.

Analogy means linking a problem not provided for in the Shariah with one for which a provision exists on the basis of the cause shared in common by the two problems.

According to this' definition there are four ingredients of analogy:

(1) The Problem to which analogy is established i.e. the problem explicitly provided for. This is termed in jurisprudence as the original problem.

(2) The object of analogy i.e. the problem not provided for and for which a provision has to be deduced through analogy. This is known in jurisprudence as the corollary.

(3) Provision this means existing provision for the original problem and from which a provision for the corollary has to be deduced.

(4) Cause: It means '*Raison d'etre* of the provision pertaining to the original problem snared in common with the corollary.[1]

(136). Question of Drawing Analogy in All Provisions of Shariah

The jurists differ on the question of legitimacy of drawing analogy all the provisions of Shariah. A small group of jurists holds that analogy can legitimately be drawn without exception, since there is no specific difference between the provisions of Shariah and since all the provisions fall within the province of the Shariah and are common therein. Some of these provisions have been deduced through analogy. Now if analogy is justified in some cases, they argue, it is admissible in others too.

On the contrary, most of the jurists are of the opinion that drawing analogy in all the provisions is not generally legitimate, even though they fall within the same limit; for they are multifarious and different from one another by virtue of diversity and distinction.

1. *Abdul Wahab Khallaf*, Principles of Jurisprudence, P.42.

in some cases analogy is justified and established because of their respective peculiarities and their being determined and not because they constitute provisions of Shariah pure and simple. According to this group of jurists analogy is disallowed on two grounds which are as follows:

(1) Analogy is forbidden in all provisions because it leads to something inhibitory inasmuch as every analogy presupposes an original problem. If a provision is to be established by analogy, it follows that original problem will have to be established by analogy, and the same origin of the original problem will have to be analogically deduced as well. If this chain of deduction continues indefinitely, analogy will cease to exist as it would hinge on endless originals.

(2) Some provisions of Shariah are established by such decisions as cannot be rationally explained; for instance the punishment of a hundred stripes prescribed for an unmarried adulterer and eighty stripes for one guilty of slander. In such cases no analogy can possibly be drawn as this process involves the establishment of the cause of original problem in the corollary. But when the cause of the original itself is not comprehensible how can such a cause be established in corollary by drawing an analogy.[1]

(137). Recourse to Analogy in Matters of Crimes And Punishments

Jurists opposed to having recourse to analogy in respect of all the provisions of the Shariah differ on the question of drawing analogy in matters of crimes and punishments. Some of them consider it legitimate to have recourse to analogy in such matters while others oppose it. Each group has certain arguments to advance in support of its respective position. Those who favour analogy for the determination of crimes and punishments advance the following arguments:

(i) When asked by the Holy Prophet (S.A.W.) how he would decide a matter in hand, Hazrat Moaz said, I will first try to decide it in accordance with the Holy Quran. If no provision is to be found in the Quran, then I will seek guidance from the

1. *Al Ahkam Fil Usool-ul-Ahkam,* by Aamadi, Vol.4 P.89.

Sunnah. But if no provision is found in the *Sunnah* either then I will decide 'the matter at my own discretion." The Holy Prophet (S.A.W.) endorsed Hazrat Moaz's approach. The latter's observation that he would resort to *ijtehad* (discretionary inference) constitutes a general statement containing no details whatsoever. Hence the justification for analogy in matters of crimes and punishments.

(ii) When the Prophet's Companions sought Hazrat Ali's guidance as to the kind of punishment to be awarded to a drunkard, he observed, "When a person drinks liquor, he will naturally be intoxicated and will, in a state of delirium, utter nonsense and calumniate the people." The Prophet's Companions then prescribed the punishment of slander for drinking liquor as well. It may be seen from this that Hazrat Ali (RAA) deduced the punishment of drinking on the analogy of the punishment laid down for slander. There was no objection to this inference and thus a consensus was arrived at.

Jurists opposed to analogy in matters of crimes and punishments give the following reasons in support of their standpoint:—

(a) *Hudood* and expiations fall within the province of a priori matters whose signification as necessitated by assumption is impossible to conceive, whereas the very basis of analogy is to understand the cause of the original problem. In case of provisions whose cause is incomprehensible, it is difficult to draw analogy.

(b) *Hudood* and penalties are punishments. There is punitive element in expiation also. Now analogy involves risk of error which in its turn involves doubt and doubts invalidate *hudood,* as the Holy Prophet (S.A.W.) enjoins:"In the presence of doubts rescind the *hudood".*

(c) The Shariah prescribes amputation of hand as the punishment for theft but such punishment has not been laid down for secret correspondence with belligerent disbelievers, although the punishment in question ought to have been provided for in all probability. Similarly expiation has been made obligatory in case of *'zahar'* inasmuch as it is evil and untruth. But no expiation has been made obligatory for apostasy in spite of the fact that it involves greater element of evil and falsehood than *'zahar.'* Now as the Shariah does not lay down such punishments in matters

referred to above, it follows that punishments do not admit of analogical deduction.

The arguments advanced by the second group of jurists seem to be strong enough to merit preference to the view held by the first group particularly when we take into consideration the fact that the establishment of the *hud* for drinking rests on consensus rather than analogy and reasoning by analogical method in this respect is unreliable; for the relevant law does not become binding because of analogical inference. It rather assumes the status of binding law on account of consensus.

Nevertheless it should be borne in mind that analogy in matters of punishment demands that this method of reasoning should be resorted to in the determination of crimes. Those who believe in the legitimacy of recourse to analogy in crimes do not mean creation of new crimes and new punishments.. All that they mean is to broaden the scope of the application of provisions. That is why analogy does not enjoy the status of a source for framing laws in respect of crimes and punishments. It is simply an interpretative source conducive to the determination of actions that fall within the range of a provision.Thus if a provision declares anything specific unlawful on account of its cause analogy would just bring under the provision all the similar cases wherein the cause for prohibition is present; for instance, the act of sodomy on the analogy of adultery, the act of killing by means of anything on the analogy of slaying with a weapon having a sharp edge any intoxicant on the analogy of liquor (according to some jurists) and a grave on that of a house or a safe place so much so that one who steals a shroud from a dead body is treated as a thief for purposes of punishment. There is obviously no harm in accepting this view, since the courts today follow it and the scholars of law are endeavouring to widen the scope of its application.

(138) Analogy in Criminal Cases

The jurists acknowledge analogical deduction in criminal cases. They go even a step further and recognize such other sources, too, as are not acceptable to them as the origin of criminal law, e.g., a prevailing custom or the practice of a Prophet's companion. Thus some jurists regard as obligatory profession of the offence of theft twice on the analogy of the condition laid down for adultery under which the offender must confess his crime four times. But certain other jurists do not accept the extensibility of this condition and confine its application to adultery alone. Once more, some jurists hold that the evidence of women in criminal cases is not justified; whereas other consider it legitimate on the analogy of evidence of two female witnesses in civil matters. Again, the jurists are unanimous on digging a ditch for an offender sentenced to stoning [as was the practice of Hazrat Ali (R.A.A.)]. And according to Imam Abu Hanifa it is essential that the mouth of one accused of drinking should smell of liquor besides the evidence of two witnesses before he is convicted. (This was the practice of Hazrat Abdullah bin Masood).

1. *Al-Aamadi Al Ahkam fi Usool-ul-Ahkam,* Vol. 4, P.82

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ELUCIDATION OF PROVISIONS

(139) Powers of the Court for the Elucidation of Provisions.

The court applying the provisions of Shariah is empowered to elucidate and clarify them if it finds obscurity and depth in their implications or ambiguities in their wordings. In order to comprehend injunctions in the light of provisions, the jurists have framed certain elucidatory rules. These rules are of two kinds: (a) lexical and (b) legal.

RULES OF THE FIRST KIND

LEXICAL RULES OF ELUCIDATION AND INTERPRETATION.

(140) How have these Rules been derived?

The jurists have derived the lexical rules by conducting research on Arabic words, texts and manners of expression as well as by a study of the senses in which they are commonly understood. These endeavours of the jurists have revealed that implications of words, texts and manners of expression are sometimes clear and sometimes obscure according as the words and texts are clear and difficult. Again the scholars of jurisprudence have also enquired into the number of various signification's of a word, the way it comprehends the different individuals signified by it as well as the extent of its general signification. They have also found out specific connotation of a word and the fact that a word applies only to some individuals of the kind denoted by it and not all of them. It is absolutely essential then, to study the following questions in order to have a full grasp of lexical rules of elucidation and interpretation:—

(1) Significations of words, texts and their senses.
(2) Clarity and obscurity of signification.
(3) Mutuality, Generality and particularity of words.

The reason for making lexical rules of elucidation and interpretation is to help in understanding the meaning of a *shariat* provision but these rules are flexible enough to be conducive to the comprehension of the meaning of a non *shariat* provision as well.

(141) Meanings of Words and Texts

Evidently, every word and text conveys a meaning. Since a *shariat* provision also consists of words and text. It too has a meaning or many a meaning. These meanings generally form the grounds of argument. There are five categories of meanings conveyed by a *shariat* provision:

(i) **Textual Meaning:**

This refers to the sense that is evident from the wording of the text and are directly intelligible to the mind. The provision is designed by the law maker (God and the Holy Prophet) to convey this evident sense; for when the law maker words a provision, he chooses such terms and phrases as clearly convey the exact meaning he intends. He then arranges the words and phrases in a manner that a person who is familiar with the provision would, on the strength of his knowledge, perceive the intention of the law maker:

(ii) **Suggestive Meaning:**

Suggestive meaning refers to a sense for which neither a provision is intended, nor does a mere knowledge of the provision leads one to think of that meaning. But the text of the provision and some of the words and expressions occurring therein do convey the suggestive meaning. In other words suggestive meaning is the sense that is necessarily signified by the provision but it is not what is intended in the context, as far example the following verse of Holy Quran:—

> "And it is for the poor fugitives who have been driven out from their houses and their belongings, who seek bounty from Allah." (59:8)

The meaning conveyed by this injunction, which is the purpose of its revelation, is that the indigent refugees have a share in the property left by the unbelievers without fighting. But it suggests that the refugees stand ejected from the property they have abandoned; for when they are referred to as indigent, it follows that they do not own anything.

(iii) Implication:

Implication means what is understood by the spirit and logic of the provision. If the text of a provision implies an injunction regarding an incident by virtue of the cause making the injunction binding, then every incident of the same nature involving also the cause of the injunction will fall within the meaning of the injunction provided that the presence of the cause of the injunction is equivalent to or of a greater magnitude than the incident about which the injunction may have been revealed and also provided that our mind immediately apprehends the equivalence or greater magnitude thereof; as for example Allah says:—

"Say not 'Fie' unto them nor chide them." (17:23)

In this verse Allah forbids to say "fie" to one's parents and to reproach them and declares such an act unlawful. This is what the text means. But by implication it follows that any form of misbehaviour towards one's parents which is equivalent to or worse than saying 'fie' to them or reproaching them will unlawful, too, because in the latter case also the cause of unlawfulness is present and any act worse than saying 'fie' will be the more unlawful as the cause involved is stronger. However, misbehaviour of a lesser degree does not fall within the purview of this injunction.

This way of reasoning is called drawing obvious analogy as the equivalence or greater magnitude of the meaning of the object of analogy to the matter stated (original problem) is apparent. Similarly implication is also termed as 'corresponding sense' because such a sense (as included in the cause of the provision) is in complete harmony with the meaning of the matter stated and can consequently be understood by the text of the provision clearly. Again, it is termed as the import of the speech that is the spirit of speech and what is understood thereby.

(iv) Required Meaning:

The sense of a provision necessitated by the provision itself is termed as its 'required meanings'. A word used in the provision cannot be understood in its true perspective unless the required meaning of the provision is clearly apprehended.

Take for example the following verse of the Holy Quran:

"Forbidden unto you are your mothers." (4:23)

The word *'hurrimat'* (forbidden) occurring in this injunction may be taken in different senses. But its real meaning cannot be understood unless we take it to mean prohibition of conjugality, and this exactly is the required meaning of the expression *'hurrimat'* in this verse

Again, Allah says:

"Forbidden unto you is carrion." (5:3)

Here the required meaning is that eating of carrion is forbidden.

(v) The Obverse Meaning:

This means the sense opposed to the meaning of the text or the sense which is devoid of the conditions laid down in the provision. But scholars differ on obverse meaning. One group of them holds that every provision conveys two senses. One of them relates to the injunction laid down in the provision and is to be found in the wordings of the text and the other sense is the very antithesis of the injunction; for example the Quranic verse (او دمًا مسفوحًا) implies that to shed blood is unlawful but in the light of the statement thereof it also implies that unshed blood is lawful. Thus whenever the statement of a provision signifies a determined injunction its obverse meaning would imply the antithesis of the injunction. In other words a provision on this view is not passive in respect of its antithetic implication?

The other group of jurists, however, is of the view that a provision does not express obverse meaning; for a provision is intended for the exposition of what is meant and not for the expression of any obverse sense. According to this view the signification of a provision consists in the junction laid down and any obverse sense thereof signifies nothing at all. This is the most correct view.

(142) Clash of Meanings:

If a conflict arises between the kinds of meanings mentioned above, the textual sense is to be preferred to the suggestive sense; because it is actually the former meaning for which the provision is intended; whereas the suggestive sense is the meaning of certain expressions occurring in the provision which is necessarily conveyed by the provision but is not intended by the law-maker.

If the textual and suggestive meanings come into clash with the implication of a provision, the former meanings are preferable to implication, since both the preferable meanings are derived from the words used by the lawmaker; whereas implied meaning is understood only by the spirit and logic of the provision. Evidently we cannot ignore the meanings of words and statements of the lawmaker for the sake of such meanings as are understood only by the spirit of the provision.

The required meaning, however, is to be given priority to all the other meanings since the real meaning of a provision cannot be understood without taking into account the required meaning.

As for the obverse meaning, we have already seen that according to the accepted view, the provision is passive in this respect (?) and thus such a meaning is not operative.

(143) Clarity and Obscurity.

Texts and provisions may be divided into two kinds in accordance with the intelligibility of their meaning:—

(i) Lucid and free from all sorts of ambiguities and obscurities and

(ii) obscure.

In a lucid provision there are different degrees of clarity. Some of the meanings are more clear than others.

Similarly in an obscure provision there are several levels of obscurity. Such a provision conveys shades of meanings with varying degrees of obscurity.

(144) Kinds of Lucid Words and Texts

Lucid texts and words may be subdivided into the following classes

(1) Obvious (2) Contextual (3) Construed and (4) invariable.

(145) Obvious

An obvious word or text is one whose form clearly conveys its meaning and which does not require any extraneous aid to be comprehensive but whose meaning does not, in its context, constitute

the sense essentially conveyed by its mood for instance the text of the following verse:—

"Allah permitteth trading and forbideth usury" (II:275)

"In this verse the senses of lawfulness of trade and unlawfulness of usury are quite intelligible without recourse to any extraneous aid; but these senses are not intended in the context of the verse since the verse in its context states that trade does not bear affinity to usury. It refutes the views of those who maintained that trade was similar to usury

"That is (their punishment) because they say Trading is like usury." (2 275)

Rule relating to the obvious text. The injunction regarding this question is that the meaning of the obvious text is binding unless a contention to the contrary is established, since the essence of the obvious' is that its word should not be detached from its apparent sense, unless an established contention to the contrary requires to do so or unless it means something different.

If the obvious text or word is general, it may be qualified; if unqualified it may be qualified and if substantive it may be taken in a figurative sense. In the same way other forms of interpretation may be resorted to. However, no interpretation would be correct, unless the grounds of interpretation are in tune with the spirit of the provision, analogy or the *Shariah* and with the general principle of the *Shariah*. If the interpretation is not based on the *Shariah*, it would be invalid.

(146) Contextual word or text.

Contextual word or text is that which clearly signifies its intended sense as is essentially denoted in the context. A word denoting its sense essentially signified in the context, which a word constitutes explicit injunction. The following verse of the Holy Quran constitutes explicit injunction to the effect that there is no similarity between trading and usury, since this is the evident meaning of the word and its contextual signification

"Allah permitteth trading and forbiddeth usury" (2:245)

Rule relating to Contextual Word.

This is similar to the rule relating to the obvious word or

text, and thus a contextual sense of a word admits of no interpretation.

(147) Construed Word or Text.

A construed text is one whose word implies such an interpretative sense which admits of no further interpretation; for instance the following divine decree as regards those who calumniate chaste women:

"Scourge them with eighty stripes." (24:4)

If a terse injunction is amplified by the interpreters such an injunction will also fall within the province of construed text. For instance, Allah says:

"And slay not the life which Allah hath forbidden save with right." (17:33)

Here the injunction is condensed. The Holy Prophet (S.A.W.) amplifies it as follows:—

"Slaying of a Muslim will be legitimate for three reasons: Commitment of adultery by a married person, apostasy and unwarranted murder."

Rule relating to Construed Text :

Construed text is binding in accordance with its construction. Such text is neither amenable to interpretation nor can it be detached from its obvious sense. Construction which admits of no interpretation comprises the construed sense derived either from the word of the text itself or from the statement emanating from the law-giver. Construction by jurists and scholars will not enjoy the status of law nor will it be a final word.

(148) Invariable Text.

An invariable text is one whose meaning is crystal clear and as such admits of no modification or interpretation; for the springs of such a text lies in religious tenets and it is, therefore, fundamental, for example Allah's worship and belief in divine revelations and His messengers. Again, an invariable text may enjoin virtues such as respect of parents and doing of justice. It may also comprise an injunction of particular nature declared by the lawgiver as ever-lasting, for instance, the following divine decree in respect of those who calumniate chaste women:—

"and never accept their testimony" (24:4)

An invariable injunction is not amenable to construction as it is copious and effective enough to need any interpretation.

Injunction relating to Invariable Text.

Implementation of invariable text is absolutely obligatory and cannot be detached from its obvious meaning.

(149) Clash of Texts

If obvious and contextual texts come into clash, contextual text would be preferable; for it conveys the sense intended by the lawgiver. In the event of a conflict between contextual and construed texts, the latter would be preferred; for its meaning is evident and admits of not interpretation. However, if invariable text comes into clash with a construed one, the former would claim preference inasmuch as the sense of the invariable one is more emphatic than that of the construed text.

(150) Obscure Texts

Obscure texts may be subdivided into four classes:—

(1) Equivocal
(2) Difficult
(3) Concise and
(4) The Unknown

(151) Equivocal Text.

In juristic terminology an equivocal word is one which in spite of conveying an obvious meaning, involves complication and ambiguity, and therefore calls for careful consideration in its application. Because of complication and ambiguity, one of the individuals to whom such a term may be applicable, possesses a particular quality more or less than other individuals and he or she is also given a separate name. Owing to the excess of or deficiency in the quality concerned as well as a separate name of the individual, the implication of the term in relation to him becomes doubtful and the term is rendered equivocal; for instance, the word thief applies to every individual who stealthily removes something from the owner's safe custody:for according to its very definition, 'theft' is the clandestine act of taking away

something from the owner's secure place. Now the question of applying the word 'thief to a pickpocket gives rise to complication and uncertainty, inasmuch as a pickpocket by the sleight of hand stealthily removes money from a person who is awake and vigilant. Thus a pickpocket possesses the quality of boldness more than a thief, hence he bears the name of a pickpocket rather than that of a thief. Similarly we have the example of a shroud-stealer Such an offender, according to some scholars, steals something that does not belong to anyone and according to other scholars he steals something from an unprotected place.

Hence the word 'thief' would be treated as equivocal and the problem arising out of its ambiguity has to be solved through discussion and *ijtehad*. If the jurist finds that the word 'thief' is applicable to a pick-pocket or a shroud-stealer, he will declare him identical with a thief and will apply to him the injunction meant for a thief. But if the jurist is of the opinion that the word 'thief' cannot in any way be applied to either, the injunction relating to thief will not be applicable to either of the offenders. However, according to the jurists the *mujtahids* (scholars recognized as authorities competent to draw corollaries) are unanimous on treating the pick-pocket as a thief but differ on the question of declaring a shroud-stealer as such.

(152) Difficult

A difficult word is one which by its mood and grammatical form does not signify what is actually meant by it, but its meaning can be determined with the help of something extraneous. Example of such a word is a common term coined to convey many a meaning but its own mood or grammatical form does not have any such sense as may indicate the intention of the law-maker. It may yield its real meaning when surmised with reference to something extraneous; for instance the word 'quroo' (courses) in the following verse of the Holy Quran:—

> "Women who are divorced shall wait keeping themselves apart, three monthly courses." (2:228)

The word '*Quru*' is designed, to convey two senses:menstrual period and the alternate period of cleanliness. But the grammatical form of this word does not contain anything to indicate which of the two courses is really meant.

Sometimes ambiguity results from comparison of different provisions. This is how it happens:each provision conveys it's obvious sense without any ambiguity whatsoever. But ambiguity arises when attempt is made to put them together and link them with one another.

Ambiguity of a difficult word may be removed by *ijtehad*. If any provision contains a common word, the jurists should try to determine its actual meaning by removing ambiguity in the light of the Holy Quran and reasoning on the basis of Shariah. However, should the meanings of a provision are inconsistent and at variance with one another, the jurist should try to harmonize them by correct interpretation and thus remove their apparent contradictions, provided that in interpreting the provisions, he keeps in view the general principles of Shariat and essentials of legislation.

(153) Concise Word

A concise word is one whose grammatical form does not indicate the actual meaning; nor is there any literal or circumstantial object of reference that may help in apprehending such meaning. Concise words include all those terms which are given specific technical meaning by the law-maker by detaching them from their lexical meaning; as for example the words *salath* (prayer), *'Zakath'* and 'Siam' (fasting). Such words also comprise all those expressions which are designed by the law-maker to convey technical legal senses instead of their lexical meanings. However, when such an expression occurs in a *shariat* provision it will be treated as a concise word unless it is explained by the lawmaker. That is why the Prophet's practice and sayings explain the meaning of the word *'Salat'* (prayer) by determining its essential parts conditions and particulars. Similarly, words like *'zakat'* and *'Salam'*, which were concise in the Holy Quran, have been clarified by the Prophet's traditions.

A concise word is also one which has been explained in the Holy Quran itself:—

> "The calamity! What is the calamity? Ah, what will convey unto thee what the calamity is! A day wherein mankind will be thickly scattered, moths and the mountains will become a carded wool." (101:1-5.)

In short any word is concise by which the lawmaker means nothing specific nor do the extraneous probabilities point to such specific sense, and only the lawmaker himself can explain it. If he has not explained any such word, there is no other way to make it out.

If the law-maker has adequately explained a concise word in detail, it will cease to be concise and assume the character of a difficult expression and the jurist then, shall have the right to remove its obscurity on behalf of the lawgiver by means of *ijtehad* without, however, adding to the inadequate details given by the law-maker.

(154) Mystic Word

A mystic word is that whose grammatical form does not signify what is actually meant by it; nor are there any extraneous probabilities indicative of its meaning and whose significance the law-maker has confined to his own knowledge by leaving it unexplained. Mystic words are not to be found in the legal provision or in such verses of the Holy Quran and sayings of the Holy Prophet as comprise injunctions. The mystic expression occurs in texts other than law. Examples of such expressions are the letters of the Arabic alphabets with which several surah as of the Quran commence.

(155) Common, general and special words

Words fall under three categories according to the meanings they are designed to convey:

(1) Common
(2) General
(3) Special

(156) Common Word

A common word is that which is designed to convey two meanings in different contexts and serves as a substitute for the sense it signifies, that is to say, it sometimes conveys one meaning and sometimes the other; for instance the word *'Qura'* applies to both the monthly periods of a woman:the period of menstruation and the period of cleanliness. Again, the word *'Aedihuma'* in the

Quranic injunction relating to the amputation of a thief's hands may mean either the right or the left hand of a person found guilty of committing the offence of theft. Again, hand means part of human body stretching from fingers' tips up to the wrist as well as up to the shoulders.

A common word is sometimes shared by lexical and technical shariat senses. Sometimes it is shared by a number of lexical senses. If it is common in lexical meaning and specific connotation of the shariat, it must be taken in its specific connotation. For instance, the dictionary meaning of the word *'talaq'* (divorce) is to do away with a bondage whereas in the *Shariah* it connotes doing away with bondage of wedlock. Thus in the divine decree the above word would be taken to mean breaking matrimonial tie.

If a common word is shared by more than two meanings, it must, on the basis of cogent grounds, be taken only in one sense to the exclusion of others. The jurist is supposed to determine that one particular sense by taking into consideration all the probabilities and indications. An example of a common word shared by two dictionary meanings is provided by the letter in the following divine injunction:

> "And do not eat of that on which Allah's name has not been mentioned and that is most surely a transgression."
> (6:122)

In this verse, is a common word. It conveys the dictionary meanings of a conjunction as well as that of present tense. If we take it in the sense of present tense, it would mean prohibition of that on which Allah's name has been mentioned, as mentioning the name of what is other than Allah amounts iniquity. If treated as a conjunction it would mean absolutely unlawful, whether the name of what is other than Allah is mentioned or not.

Whatever the number of senses conveyed by a common word, the lawmaker intends only one out of those senses, while all the other senses assume the character of alternatives, that is, if it is designed to convey one meaning, the other meaning is excluded and as these meanings are different, the word, if taken in both the senses simultaneously, would convey two meanings opposed to each other.

(157) General Word.

A general word is that which is coined to convey such a single meaning that it applies to indefinite number of individuals and is in its dictionary sense inclusive of all such individuals (and for that matter all the elements), for instance, (the word *'wasiat'* (bequest) in the following edict of the Holy Prophet:

"Wasiat (bequest) in favour of heirs is not right."

In its dictionary sense the word in question includes all bequests, for *'wasiat'* is a generic noun and is preceded by a negative expression which implies generality. The difference between a common and generic word is that the former is designed to mean several things, whereas general word lexically conveys only one meaning, although the meaning includes several persons.

Words yielding benefit on account of generality have, by induction and after research, have been sub-divided into seven categories

(i) Each of the words 'Kul' (all) and *(Jame'e)* embraces all the individuals and species it refers to; for instance the word (all) in the following divine decree:

"Every man is a pledge for what he has earned." (52:21)

(ii) Simple word with which a definite common noun is formed by prefixing thereto; for instance the nouns *'sariq'* and *'sariqa'* (a male thief and a female thief) in the following divine decree:

"Cut off the hands of the stealing man and the stealing woman." (5:38)

Again,

"And Allah has allowed trading and forbidden usury." (2:275)

In the foregoing two verses the genus consists of *sariq* (thief) *bai'e* (trading) and *riba* (usury) and each of this genus is present in the respective species. Hence the injunctions are applicable to every thief, every transaction of trade and every transaction of usury.

(iii) The character of genus lent to a noun by alif lam or *izafat.* By addition of

Women who are divorced shall wait, keeping themselves apart (2:228)

By annexation:

Forbidden unto you are your mothers (4:23)

(iv) A relative pronoun:

And those who accuse honourable women but bring not four witnesses scourge them with eighty stripes. (24:4)

(v) Conditional Pronoun

"Whoso slayeth a believer of a set purpose." (4:93)

Again,

Hide not testimony. He who hideth it, verily his heart is sinful. (2:283)

(vi) An Interrogative Pronoun.

Who is it that will lend unto Allah a goodly loan so that He may give it back increasing manifold." (2:245)

Words belonging to each of the above classes yield the benefit of generality and commonness by virtue of their form.

(158) A General Word is Unequivocal

If a general word occurs in a provision and there is no evidence of its qualification, it will always be taken in its general sense; for lexically it is designed to signify generality and, moreover, there is no evidence to the contrary which may negative its generality. The injunction borne out by such a provision will be unequivocal in relation to the individuals or species of the same genus without involving any element of doubt whatsoever, since the meaning of a word in its application is unequivocal and that is what the following principle means:

"A general word which is not qualified includes all the individuals or species of the same genus."

If the connotation of a general word is qualified in respect of certain species, then it must be extended to other species by surmise. As a result of qualification, the relevant provision would become conjectural so far as the remaining species are concerned; for in the presence of a provision qualifying, the relevant provision

would become conjectural so far as the remaining species are concerned; for in the presence of a provision qualifying a general injunction, certain species will be associated with the qualifying cause (and thus they would be excluded from the purview of general injunction) and when qualifying causation comes into operation other species of the same genus would also be amenable to qualification. In other words qualification in the first instance would render unqualified species conjectural and because of this conjectural character the injunction would no longer be unequivocal. The following verse of the Holy Quran provides an example of this

"Lawful unto you are all beyond those mentioned."

(4:24)

This is a general injunction which has been qualified by the Holy Prophet (S.A.W.) in the following words:—

"Wedlock between all such foster-relations is forbidden as corresponding to blood relations."

This qualification of the general injunction has opened the door for further qualification by scholars. Thus on the analogy of forbidden kinsfolk related by matrimonial ties the jurists have declared wedlock unlawful with corresponding foster-kinsfolk bound by matrimonial ties.

(159) Effects of an unequivocal General Injunction

There are two significant aspects of an unqualified general injunction conveying unequivocal meaning:

First, a general injunction of the Quran and the Prophet's practice or edict established by successive tradition cannot be specified by discontinued tradition, for both analogy and the interrupted tradition are ambiguous and an unequivocal injunction as such cannot be specified by an analogous injunction. However, when a general injunction is qualified through unquestionable argument, it is amenable to further qualification by analogy and discontinued 'sunnet' since following initial qualification a general injunction be comes ambiguous and as such it is open to qualification by another ambiguous injunction.

Second, if an unqualified general provision implies an

injunction that is at variance with a particular provision the two provisions would he treated as contradictory, since both are equal and unequivocal. However, if a general provision is qualified, it will cease to be in conflict with the particular provision, inasmuch as the former would turn equivocal by virtue of qualification, while the particular provision remains unequivocal. That is why the equivocal and unequivocal injunctions are not in conflict and the latter is preferable to the equivocal.

There is however a group of jurists who hold that a general injunction is always equivocal because an enquiry into the *shariat* injunction has revealed that no general injunction retains its generality. Hence the following rule:

"Every general injunction stands qualified."

As a result of this dictum, the injunctions involved by the provisions of the Quran and the Sunnah can be qualified initially as well and if a general provision implied an injunction and a particular provision happens to be at variance with it then there would be no conflict between the two; for in accordance with the above dictum, the general provision would be regarded as ambiguous and the particular one would be preferred thereto on the ground of its being unequivocal. As a general rule, there can be no conflict between the equivocal and the unequivocal since the two are equal. Conflict occurs only between two words of equal status.

(160) Qualification of General Injunction

Qualification of general injunction aims at delimiting its generality so as to confine it to some species to the exclusion of others. However, such a qualification must, of necessity, rest on two grounds:Substantive and unsubstantive.

(161) Unsubstantive ground

Consists of a part of general provision, for instance, the exception in the following divine decree:

And those who accuse honourable women but bring not four witnesses, scourge them with eighty stripes and never afterward accept their testimony save those who afterward repent and make amends. (24:4)

(162) Substantive Grounds

Grounds that do not constitute part of general injunction fall under three categories

(1) General Principles of Shariah

(2) General practice of Shariah

(3) Provisions of Shariah

(i) General Principles of Shariah

General injunctions of the Shariah are qualified by the general principles thereof; as for example the provisions which lay down without qualification the responsibilities of a person bound by obligations, but such provisions are applicable to individuals capable of bearing the responsibilities laid and not to those incapable of bearing them such as children and insane persons. Thus the general principles of Shariah qualify general provisions thereof.

(ii) General Practice of Shariah

General practice also qualifies general provisions and such provisions are consequently applied at places where the prevalent general practice requires them to be applied. An example of such a qualification is the prophet's edict:-

"Stealing of less than four *dinars* does not entail amputation of hand."

The amount of *dinars* prescribed in this injunction is governed by the value of money current among the people.

(iii) Shariat Provisions

Sometimes one general provision of the *Shariah* qualifies another general provision provided that the qualifying provision is equivalent to or greater than provision qualified in respect of positively or ambiguity. This means that one Quranic injunction can qualify another Quranic injunction and one authentic tradition of the Holy Prophet (S.A.W.) can qualify another authentic tradition. Similarly one *akh bar ahad* can qualify another *'akhbar ahad.'*

A Quranic injunction may be qualified by a successive or authentic tradition of the Holy Prophet (S.A.W.) but Quranic injunction is amenable to qualification through a discontinued or well-known tradition. In the same way a continued tradition or well-known tradition does not admit of qualification by means of

akhbar ahad, since the Quran, continued and well-known traditions are unequivocal whereas *akhbar ahad* is equivocal.

(163) Purpose of Qualification

The purpose of qualification is either to explain the meaning of a provision or to invalidate and nullify an injunction in relation to some individual. The general rule in this regard requires that a provision is to be elucidated by another provision of the same order or superior thereto. The same rule is followed in nullification.

(164) Special Word

A special word is that which signifies a particular person such as Muhammad or a species such as man or several individuals such as three, ten, hundred or group, party or gang etc. But it does not signify all the individuals at once.

(165) Injunction as Special Word

When a special word occurs in a provision it signifies unequivocally the meaning it is designed to convey; for instance, the following divine command:

"Scourge them with eighty stripes." (24:4)

Again,

The expiation thereof is the feeding of ten of the needy. (5:89)

In the above verses the words 'eighty' and 'ten' convey unequivocal meaning as there can be no enhancement or reduction in these exact figures.

However, if there are grounds for interpreting a special word in some other sense, it will then be taken in that sense, as jurists have done in the case of the word (goat) occuring in a saying of the Holy Prophet (S.A.W.):—

"One in every forty goats is poor man's due."

The apparent meaning of this sacred tradition is that the poor man's due for every forty goats is necessarily one goat. It will be wrong to take the word in the sense of the value of a goat. But the principles of elucidation and taxation require that this word should be detached from its apparent meaning and interpreted differently for the purpose of *zakath* or the poor man's due is to meet the needs of the poor, which can be done with the

value of the goat in the same way as with the goat itself. Hence the word is taken in the sense of both a goat and the value of a goat. Similarly, the jurists have interpreted "the feeding of the ten of the needy" (in the above verse) to mean that feeding the same needy person ten times is as legitimate as feeding ten needy persons.

(166) Forms of Special Word.

There are many forms of special word. Sometimes it is unqualified and sometimes qualified. Sometimes it also takes the form either imperative or prohibitive mood.

(167) Unqualified and Qualified.

An unqualified word is one which signifies a general individual or class, for example an Egyptian,' while a qualified word refers to a qualified individual and is inclusive of the qualifying expression, for example an Egyptian Muslim.

The rule governing an unqualified word is that unless there are grounds of its qualification, such a word will remain unqualified and when the grounds of its qualification are established, it will be removed from its general signification and its meaning will be determined; take for example the following divine injunction:

"Retaliation is prescribed for you in the matter of the murdered." (2:178)

This verse seems to indicate that retaliation is possible in every case of murder. But the Holy Prophet (S.A.W.) has qualified this word in the following edict:—

"The father will not be slain in retaliation for the son."

In other words the Quranic verse relating to wilful murder refers to wiiful murder committed by persons other than the father.

If the same word is unqualified in one provision and qualified in another, and the injunctions comprised by both the provisions as well as the cause of the injunction are identical, the unqualified word will be treated as qualified and the signification thereof should be regarded as qualified too; for as the result of the identity of cause and injunctions no difference is conceivable between qualification and un-qualification. An example of this is provided by a verse of the surah entitled Maida:

Forbidden unto you are carrion and blood and swine flesh. (5:3)

In this verse the word 'blood' is unqualified. But the *same* word is qualified in a verse occurring in the *surah* on cattle

Say: I find not in that which is revealed unto me aught prohibited to an eater that he eat there-of, except it be carrion, or blood poured forth or swine flesh. (6:145)

In both the above verses the injunction (prohibition) and the cause thereof are identical and therfore, the word blood in the first verse would also be treated as qualified. However, if both the provisions differ in respect of injunctions as well as the cause thereof, the unqualified word will not be treated on the analogy of qualified word. In such an event each provision will be implemented as it is designed to be as for example Allah says:

He who hath killed a believer by mistake must set free a believing slave and pay the blood-money to the family of the slain. (4:92)

And take this verse:—

"Those who put away their wives by saying they are as their mothers and afterward would go back on that which they have said, the penalty in that case is the freeing of a slave before they touch one another." (58:3)

In either verse cited above the injunction to free a slave is identical but the cause thereof is different. In the first verse it is murder, while in the second it is *zihar* (calling their wives mothers). Because of this dissimilarity of causes, it has been enjoined that in the case of murder, the slave to be freed must be a believer so that the punishment may be harsher; but in the case of *zahar'* no such condition has been laid down; for this case does not entail severe punishment. Hence any slave may serve the purpose.

(168) Imperative Mood.

If a special word signifies imperative mood or consists of a predicate implying command it will convey the sense of assertion i.e. what has been enjoined or predicted of is binding. For example take the following divine decree:—

Cut off the hands of both of them (5:38)

Again,

Women who are divorced shall wait. (2:228)

According to first verse it is essential to amputate the hands of a thief, while according to the second divorced women should wait for three courses.

If the binding sense involved in the imperative word can be removed by any probability, then it will be taken in the probable sense.

For instance, the following divine decree is designed to signify legitimacy only:—

"Eat and drink" (2:60)

The following divine injunction enjoins only keeping of accounts:

"When you contract a debt for a fixed term record it in writing." (2:282)

The following verse is designed only to warn:

"Do what you will." (41:40)

The following verse is meant to signify humbleness:

"Then produce a chapter like it." (2:23)

Other probabilities can also hold in abeyance the binding character of imperative mood. But if there is no such probability then command would signify only obligation and assertion.

(168-A) Prohibitive Mood

When a word is used in prohibitive mood or as a predicate implying prohibition then prohibition would give the benefit of a taboo i.e. one will be under the obligation to abstain from the prohibited act. The following divine decrees are examples of such obligatory prohibitions:

"Slay not your children fearing fall to poverty." (17:31)

"And whoso becometh a renegade and dieth in his disbelief". (2:217)

If there is a probability of interpreting a prohibition in some other sense, it will be taken in its probable meaning. For instance, the following verse is meant for prayer

"O' Lord ! Make not our hearts to deviate." (3:8)

And this one is designed to indicate abhorrence:

Ask not of things which, if they were made known unto you, would trouble you. (5:101)

PRINCIPLES OF JURISPRUDENCE FOR INTERPRETATION OF PROVISIONS OF SHARIAH

(169) Nature of Such Principles

The jurists have laid down certain principles for the interpretation and elucidation of the *Shariat* Provisions, which are necessarily to be followed. These principles have been derived in conformity with and after a thorough examination of the injunctions contained in the said provisions and the causes thereof. Based as they are on *Shariah* and the spirit of the Shariah, the principles in question are indicative of the fact that the Shariah aims at the promotion of collective interests. That is the reason why some of the provisions safeguard collective interests, while there are others wherein both the individual and collective interests are given due consideration simultaneously. Hence if no provision exists in relation to any problem, the jurist and the judge would determine relevant injunction in view of the facts mentioned above.

(170) The Objects of Law-maker in Framing Law.

The lawmaker has not framed the provisions of the *Shariah* for nothing. In the contrary there are certain broad objects under lying them. Hence in order to appreciate the significance of a provision, it is absolutely essential to ascertain the object thereof; As the words and texts of a provision may be considered as involving several meanings on various grounds, it is difficult to prefer any one meaning to others unless we know the real object of the law-maker in framing it. Moreover, we cannot remove discrepancy between contradictory provisions unless we are aware of the aim of the law-maker. In short, it is absolutely essential for the student of the Islamic Law to ascertain the aims and the objects of the law-maker and the circumstances or events

necessitating the revelation of the Quranic verses and the Traditions of the Prophet. (S.A.W.) The reasons for the revelation of the Quranic verses and the raison d'etre of the Prophet's Traditions have been explained in detail in books on the subject. The broad objects of the *Shariah* have been classified into the categories by the Jurists, which are as follows.

(171) The First Object

The first and foremost object of law- making is to ensure the security of the necessities of life. These are the very things on which human life depends and are therefore, indispensable. If these necessities are not secure, there will be chaos and disorder every-where. There are five necessities of life.

(a) Religion
(b) Self
(c) Reason
(d) Race and
(e) Material Possessions

The *Shariah has* provided for the fulfillment, promotion and safeguard of each of these necessities and has declared provisions relating to them as the essential injunctions.

(172) The Second Object

The next object is to ensure necessities of life. These comprise things that are essential for the provision of various facilities to the people and for easing their toil and burden of responsibilities. Although absence of such facilities may not give rise to disorder and turmoil, yet may certainly add to their difficulties. In other words, necessities consist of such things as obviate difficulties of the people and make life easy for them.

(173) The Third Object

The third object of Islamic legislation is to bring about refinements, that is, to bring into being such things as may embellish social life and enable the people to conduct the affairs of life in a better way. Absence of refinements does not necessarily lead to chaos and anarchy as is the case with the necessities of life; nor do they consist of what is necessary to remove difficulties

and make life easy. Refinements are things, whose absence would make life disagreeable for the intellectuals. In this sense refinements comprise virtues, good manners and every thing that are instrumental in the improvement of the modes of living.

(174) Broad Objects in Order of Importance

From the legal view-point necessities of life constitute that most important purpose, inasmuch as their absence would disrupt life and lead to disorder and anarchy. Next on the legal scale of preference are the necessities whose want is badly felt by the intellectuals; human life remains incomplete on account of it. Naturally the provisions pertaining to the necessities of life deserve our first and foremost consideration. After these come the provisions about the necessaries to be followed by those relating to refinements.

In case if action on a commendable provision impedes the operation of an obligatory provision, the former will have to be ignored. For instance to undress for the treatment of an injury is a legitimate act. Here, to cover the private parts of the body is commendable, while treatment of the injury is necessary. Again, the use of tabooed or unclean thing is lawful when required, for the avoidance of what is unclean is commendable, while treatment is essential.

Similarly to do one's duty in spite of hard labour involved therein is essential, while removal of difficulties and easing of the task commendable. The commendable merits no consideration in the presence of the necessary. Necessary provision can be ignored only when there are more necessary provisions claiming consideration and when the enforcement of the former obstructs the operation of the latter. Thus war in the way of Allah is essential because protection of faith is more important than the protection of one's life. Again, drinking of alcohol under duress is permissible when one's life is imperiled, for protection of life is much more necessary than sobriety. Similarly if it is essential to destroy others property to save one's own life, such a course of action will be lawful, since protection of life is more important than the safety of property.

(175) *Collective and Individual Rights.*

Some of the acts of individuals under obligation including

offences are subject to the right of God, while in others the right of the person under obligation is predominent.

According to the jurists the term right of God connotes collective right designed to safeguard public interest and social order. Collective right is regarded as Allah's right because it does not aim at the protection of any one particular individuals right. Nobody, whether the ruler or the ruled has the power to invalidate, annul or rescind the establishment of Allah's right. Various kinds of worship including prayer, fasting, zakath etc. are reckoned as the rights of Allah-collective rights since they are designed to establish and vindicate the faith which according to the Islamic law constitutes the foundation of social order. Hence the various kinds of worship and the like affecting social set-up are treated as the right of Allah.

Punishments and fines for crimes such as theft, adultery and bloodshed that are detrimental to the society constitute the right of Allah. Also the punishments of penance and all other punishments awarded for crimes prejudicial to collective rights, public peace and political stability are in the nature of Allah's right.

There are certain acts, however, that are prejudicial both to the individual rights and the collective rights but wherein the latter right predominates, as for example, the punishment for bringing up a false charge of adultery against an honourable woman, inasmuch as this is a crime casting aspersion on reputation. Punishments for such an offence is in the interest of the person calumniated, as it may also be expedient for such a person not to prefer a complaint against the offender; for the person bringing up a charge against the accused is under the obligation to prove the charge. If the charge is proved the accused is liable to the hud laid down for adultery. Moreover as the offence of culmination casts aspersion on reputation, it engenders hatred and animosity as it is also likely to cause infamy. Mothers and their off springs are stigmatized by such an offence and the honour of the entire family set-up is called into question. That is the reason why the penalty of the offence is treated as the right of Allah and this right in the said penalty is treated as dominant over the individual's right in such a way that if the offence is proved, the aggrieved

party cannot pardon, it, although it is this party alone that enjoys the power to prosecute the offender initially. There are some acts affecting collective rights wherein the right of the individual predominates; for instance murder, which does not only prejudice purely individual rights directly but also affect social order, peace and tranquillity. Nevertheless the individual has been allowed the right to retaliate or receive compensation. In such cases the right of the individual dominates over the right of the society.

Although the jurists of Islam have classified rights into the rights of Allah and the rights of the people yet some of them hold, at the same time, that the acts bearing on purely individual rights on the one hand and on purely collective rights on the other, shall all be reckoned as the rights of Allah. In other words, they shall all be treated as being in the nature of collective rights and pertaining to social order in as much as every provision of the *Shariat* is designed to be enforced and complied with. The right of Allah, too, means that his servants should obey His Commands, abstain from things forbidden by Him and act upon His law. Thus looked at every provision is inclusive of the right of Allah. The observation that there can be such an injunction as may exclusively provide for the right of the individual can not be treated as absolutely correct. It will be regarded as a correct view in the sense that in personal matters the right of the individual is predominant. Similarly matters exclusively pertaining to Allah's right affect sooner or later the interests of the individual, for *Shariat* has come into being for the good of Allah's servants.

(176) Ijtehad.

As a technical term *ijtehad* means exertion aimed at ascertaining *Shariat* injunction on the grounds laid down in detail by the law-maker to infer injunctions.

As a general rule, there will be no room for *ijtehad* in the presence of an explicit provision whose origin of emanation is unquestionable. As its emanation is unquestionable i.e., there is no doubt as to its emanation from Allah and his messenger and since it is unequivocal its implications are naturally not debatable. Under the category of such injunctions fall the explicit and unambiguous verses of the Holy Quran; for instance the following divine decree:

"Scourge the adulteress and the adulterer with a hundred stripes each." (24:2)

Obviously there can be no *ijtehad* as to the penalty of stripes and the number thereof. Similarly all the punishments concretely prescribed are not amenable to *ijtehad.* Under this category also fall all the other explicit Quranic verses and Tradition.

However, an injunction whose emanation or implication is doubtful does admit of *ijtehad.* The mujtahid (scholar competent to do *ijtehad)* should base his argument on the authority (the way it has come down to us) and its implication.

Where no provision exists at all, the scope of *ijtehad* is very wide. In such a case the requisite injunction will be arrived at by such procedures as *qisas* (analogical reasoning) *"istehan"* (consideration of the principle of equity) *isteshab* (process of settling *fiqah* rules by linking earlier set of circumstances with later developments) *urf* or musah mussila (consideration of common good). But *ijtehad* would be resorted to in personal, civil and criminal cases. So far as the question of establishment of crimes and punishments is concerned ijtehad is not possible, as explicit provision is essential in this respect. Analogical procedure etc. will not be used in the case of crimes and punishments as has already been stated.

(177) Concluding Remarks with Regard to Principles of Interpretation

The foregoing legal and lexical rules have been laid down by the jurists as a guide to the interpretation of the provisions of *Shariat.* The Court should follow these rules for the proper understanding and determining the importance of the provisions and for ascertaining particular matters falling thereunder. The court would also be able to find out with the help of the above rules the provisions, whose application is essential as well as extent of its own power for the interpretation application or setting aside a provision. Now if a civil court has the power of applying the principles of interpretation extensively, having recourse to the procedures of *qyased* urf and of taking into consideration the demands of justice the criminal court has to depend only on the position presented to it for the interpretation and application of

a provision. Criminal court is not competent to originate crimes and punishments by *qyas,* urf or *istehran* even if the position brought up before it is repugnant to morals. In short, whatever the consideration and circumstances, the criminal court is not competent to infringe an explicit provision of the *Shariah.* It must rather conform to the following two edicts of the Holy Prophet

(1) In case of doubt *huds* are to be set aside.
(2) Error of the *imam* or the leader in granting pardon is better than his error in awarding punishment.

We now proceed to discuss these two principles.

THE FIRST PRINCIPLE

(178) Doubts Invalidate Hudood

A general principle of the Islamic *Shariah* is that *huds* are suspended by doubts. By huds are meant penalties prescribed by the *Shariah.* They include not only punishments prescribed for crimes entailing *huds* but also those designed for crimes involving *qisas* and *diyat.* However, penal punishments are excluded[1] Therefrom inasmuch as they-constitute un-prescribed penalties.

This general principle owes its origin to the following edict of the Holy Prophet:

"In case of doubt set aside hud"

This tradition was generally accepted by the *Ummah* and the jurists adopted the principle under consideration on the basis thereof. The Prophet's Companions acted on this general principle after the demise of the Prophet, Hazrat 'Umar, for instance says:—

"In case of doubt I would rather hold huds in abeyance rather than execute them."

Hazrat Mo'az bin Jabl, Hazrat Abu Masood and Hazrat Aqaba bin A'amir are reported to have said that if a *hud* is doubtful, it should be set aside.

All the jurists are agreed on the above principle save those *ulema* who emphasize the importance of overt act. They are of

1. See articles 51, 103 and 440.

the view that the huds should not be set aside for reasons of doubt. In this respect, they refuse to accept even the above saying of the Holy Prophet and the relevant observations of his Companions.[1] That is in spite of the fact that the principle is further substantiated by many traditions attributed to the Holy Prophet. For instance, when Hazrat Mo'az made confession of adultery before the Prophet he remarked, "May be that you have just kissed the woman; may be that you have just touched her; may be that you have just flirted with her." These suggestions of the Holy Prophet were actually designed to persuade Hazrat Mo'az, having confessed his crime, to say yes to one of those suggestions. Similarly when a thief confessed his crime, the Prophet said, "Did you really commit theft? Don't you think that you did not?" Similarly when a woman named Ghemidya confessed her guilt the Holy Prophet questioned her in the same manner.

In short in all these crimes entailing *huds* the only proof of commission thereof is confession of the offender himself and the Prophet on the other hand, advises the offender to go back on his confession. If denial of confession had not affected confession, the Prophet would not have asked him to back out. Now the question arises how for can the withdrawal of confession warrant the suspension of the *hud?* The answer is that in such cases the only proof of offence is the confession of the criminal and as the result of his backing out the confession itself is rendered doubtful, and doubts, as we know invalidate *hud.*

A woman by the name of Shraha Hamdanya came to Hazrat Ali and confessed that she had been guilty of adultery. Hazrat Ali observed, "Well the man may have just fallen upon you or your master may have contracted you into marriage with him - a fact which you may have been concealing." The purpose of these suggestions of Hazrat Ali was identical with that of the observation the prophet (S.A.W.) had made before him in a similar case.

This is the reason why the jurists consider it legitimate that if there is no proof other than the confessions of the offender, the court should ask him to withdraw his confession.[2]

1. *Sharh Fath-ul-Qadeer,* Vol. 4, P.139.
2. *Sharh Fath-ul-Qadeer,* Vol. IV, P. 139

(179) Definition of Doubt.

Doubt means anything which appears to be like some-thing proven although it is not proven[1] in reality or anything legitimate that may concretely present itself although no provision exists for it and which does not in itself exist in reality (?)[2]

Examples of Doubt

(i) Suspicion of ownership involved in the act of stealing joint property. For instance, if a person steals something which he owns in common with another person, the *hud* prescribed for theft will be invalidated; for theft consists in the clandestine act of getting away with something belonging to another person. But in this case the property stolen is not exclusively owned by another person but involves the suspicion of being shared by the person committing such an act.

(ii) Suspicion involved in stealing of the son's property by a father. If a father stealthily takes away anything belonging to his son he is guilty of theft entailing the penalty of the amputation of hand. But owing to the suspicion arising out of the fathers right of ownership in the son's property, the *hud* will be set aside. The basis of such suspicion is the following tradition of the Holy Prophet (S.A.W.)

"You and your belongings are the property of your father."

(iii) Suspicion involved in the act of sodomy committed on one's wife. Unnatural copulation with one's wife is unlawful and the jurists treat such a deed as adultery. But in this case the hud prescribed stands invalidated inasmuch as wife become the property of the husband after marriage, thereby acquiring the right to derive pleasure from the entire body of the wife. In other words the husband's right of ownership to his wife's person gives rise to the suspicion that he enjoys the right to copulate with her through anus. This suspicion invalidates the prescribed *hud.*

Yet another example of doubt is the suspicion involved in the absence of proof. Such a case may be illustrated by the example of a person who confesses to have committed one of the offences

1. Proof does not mean only the proof of an act but proof in its general sense including both the proof of an act and the proof of an injunction.
2. *Al-Mughni,* Vol.10, P.152.

entailing *hud*. There is no proof of his offence other than his own confession. In such a case relevant penalty of *hud* will be awarded on grounds of his confession. But if he goes back on his confession then his backing out will give rise to the suspicion of non-existence of proof, since such a suspicion would bring into question the confession of guilt itself which, in its turn, would invalidate the *hud*.

So also is the case with the backing out of witnesses provided that there is no way to prove the offence other than the evidence of the witness. Suppose a man marries a woman forbidden for him. Imam Abu Hanifa holds that the *hud* prescribed for adultery will not hold good in such a case because of the suspicion arising out of the wedlock. But Imam Abu Yousuf and Imam Abu Muhammad differ with him on this issue. They rather agree with Imam Shafi'ee and Imam Ahmed in this respect[1] who are of the view that as long as the offender is aware that the woman he marries is tabooed for him, the *hud* prescribed will not be nullified by the suspicion involved in the wedlock.[2]

Similarly in all the other cases of marriage declared invalid by the general consensus of the jurists the *hud* prescribed will, according to Imam Abu Hanifa, not hold good. Such cases include having a fifth wife, marriage with a married woman or with one in her period of waiting after divorce or with one who has been divorced by pronouncing the word *'talaq'* (Divorce') three times. In the case of these women the offender is conscious of the prohibition of marriage. In spite of this Imam Abu Hanifa[3] holds that the *hud* is multified because marriage according to him constitutes doubt and doubt invalidates the *hud*. On the contrary Imam Malik, Imam Shafi'ee and Imam Ahmed believe in the validity of the *hud* as wedlock in such cases does not give rise to suspicion at all.[4]

1. *Sharh Fath-ul-Qadeer.*
2. *(a) Sharh-ul-Zurqani*
   (b) *Asna-ul Matalib.* Vol. 4, P.126.
   (c) *Al Mughni.* Vol. 10, P.154.
3. Sharh Fath-ul Qadeer.
4. (a) *Sharh-ul-Zurqani* Vol.8, P.76, 77 & 80.
   (b) *Asna-ul-Matalib* Vol.4, P.126.
   (c) *Al Mughni,* Vol.10 P.154.

Again, Imam Abu Hanifa declares that the *hud* does not hold good in case anything basically permissible is stolen; for instance, stealing of water after being preserved or game; for both these things are basically permissible and the public have a share in them. The essential permissibility of such things gives rise to the suspicion that they remain unforbidden for the people in spite of their preservation while the share of public therein gives rise to the suspicion that the right of public to a share them remains intact even after their being taken into custody.[1] But according to the Imam Malik, Shafi'ee and Ahmed the *hud* is not multified in such a case inasmuch as they do not treat the permissibility of thing as involving any doubt.[2]

Also, Imam Abu Hanifa holds that triviality or insignificance of a thing gives rise to suspicion so that stealing of such a thing does not warrant the application of the relevant *hud* and insignificant things like limestone, soil, concrete, bricks etc. do not, if stolen, entail the penalty of amputation of *hud*. Similarly, stealing of straw, a bamboo or piece of wood and the like do not entail the punishment to cutting off the culprits hands. Imam Abu Hanifa argues that immaterial things like these do not make people rich and owing to their in-significance and cheapness people are not charry of them. In fact stinginess in respect of these insignificant things is generally treated as miserliness. Imam Abu Hanifa's view regarding immaterial thing is based on convention and custom. He does not concede that an immaterial thing becomes valuable when it undergoes industrial process, for Instance, when a bamboo is turned into a bow. Neverthless larceny of a thing that ceases to be valueless after being manufactured does entail the penalty of the amputation of hand. But Imam Abu Yousuf differs with Imam Abu Hanifa. He maintains that only in case of the pilferage of cowdung and soil the *hud* will not hold good. In every thing else having value the *hud* will hold good. According to him justification of purchase and sale is the test of value. Imam Malik,

1. *Sharh Fathul Qadeer* Vol. IV, P.277.
2. (a) *Sharh Al Zurqani* Vol. VIII, P.95.
   (b) *Asna-ul-Matalib,* Vol. IV, P. 141.
   (c) *Al Mughni,* Vol.10, P.247.

Imam Shafi'ee and Imam Ahmed too do not agree with Imam Abu Hanifa. They do not think that the insignificance of a thing whose value is commensurate with the limit fixed for Zakath involves any doubt in respect of the validity of the *hud*.[1]

Imam Abu Hanifa, again, treats the relevant *hud* inapplicable to the larceny of perishable things such as cooked food, vegetables, meat and bread. But Imam Abu Yousuf subscribes to the opposite view held by Imam Shafi'ee and Imam Ahmed. According to these Imams the quality or perishability in a stolen thing does not give rise to any suspicion, warranting the invalidation of *hud*.

Moreover, with Imam Abu Hanifa, larceny of the door of a Mosque is not punishable by the amputation of hand because its lack of protection involves suspicion.[2] On the contrary Imam Malik, Imam Shafi'ee and Imam Ahmed hold that the door of a mosque is not unprotected and hence involves no suspicion.[3]

(180) Categories of Doubt.

The Shafi'ee and Hanafi schools of jurisprudence have taken great care in the classification of doubt. But the Hamblites and the Malikites have contented themselves with raising objection to doubt occasionally and when necessary.

The Shafi'ee classify doubt into three categories

(i) Doubt regarding place.

Such a doubt is involved in acts like intercourse with menstruating or fasting wife or unnatural copulation with her. This means doubt that is caused by the place of forbidden act; for the place (or any part of wife's body) is husbands private property and he has legal right to sexual intercourse with her,

1. (a) *Sharh Fathul Qadeer* Vol.4 P.22.
   (b) *Sharh Al Zurqani* Vol.8 P.95.
   (c) *Asna-ul-Matalib*, Vol.4, P.141.
   (d) *Mughni* Vol. 10, P.247.
   (e) *Badae'-wal.Sanae'* Vol.7, PP.67 and 68.
2. Sharh Fath-ul-Qadeer.
3. (a) *Sharh-Al-Zurqani* Vol. P.99
   (b) *Asna-ul-Matalib* Vol. 4 P. 140.
   (c) *Al Mughni*, Vol. 10, P.255.

although he is not allowed to exercise this right when his wife is fasting or undergoing menstrual course, nevertheless the husband enjoys proprietary right to the part or place of her body, which gives rise to doubt. Such a doubt, in its turn requires suspension of the prescribed *hud* whether or not the agent is convinced of the legitimacy or illegitimacy of his act, inasmuch as the doubt is not grounded in the belief or scepticism of the agent, but owes its origin to the place subject to the impact of his act, which he is legally entitled to.

(ii) Doubt caused by the Agent.

Example of such a doubt is provided by the case of a woman sent to the bridegroom on his wedding night. The bridegroom mistakes her for the bride and enters into sexual intercourse with her. Later it is found that the woman is not his bride. This gives rise to a doubt grounded in the agents belief that he is not committing an unlawful act In short, the agents act causes doubt which in its turn invalidates the *hud* laid down for adultery. But if he commits such an act wittingly it will not cause any doubt whatsoever. He will then be guilty of adultery.

(iii) Formal Doubt

By this is meant doubt as to the legitimacy or illegitimacy of an act springing from disagreement among the jurists. Doubt will arise where the jurists differ on the legitimacy or otherwise of anything and consequently the relevant *hud* will not hold good. For instance, with Imam Abu Hanifa marriage is illegitimate without the consent of guardian. Likewise, Imam Malik does not consider witnesses essential for the legitimacy of nuptials. Again Ibn Abbas treats *Muta* (provisional marriage) as lawful. Hence the *hud* for adultery will not be brought to bear upon sexual intercourse in all such doubtful cases of marriage by treating it as fornication. Although the agent may himself be convinced of the legitimacy of his act, yet his conviction will be of no consequence in the presence of the difference of opinion among the *Ulema*.

The Hanafite jurists classify doubt into two categories which are as follows:-

(i) Doubt Involved in Act[1]

In the Hanifite terminology such an act is ambiguous and the doubt inherent therein is termed as doubt of affinity. A doubt like this is involved by an act about whose legitimacy or illegitimacy the agent is uncertain and there is no traditional proof either of its legitimacy. He has rather justified it himself for some reason or other, which however, does not constitute the proof of its legitimacy. For instance, a man enters into sexual intercourse with a woman during her waiting period following divorce i.e. after formally pronouncing *talaq* three times[2].

The condition of doubt in the act is the non-existence of the proof of its unlawfulness and the agent is fully convinced of its legitimacy. But if there does exist the proof of its unlawfulness or the agent is not fully convinced of its legitimacy then no doubt is involved.

(ii) Doubt Involved in Place.

The Hanafi Scholars term it as injunctive doubt or doubt involved in proprietary right. The condition of such a doubt is that it arises out of an injunction of the *Shariah,* for instance, theft is unlawful according to the Quranic injunction. But the Prophet (S.A.W.) observes, "You and your property both belong to your father." According to first injunction theft is unlawful and punishable by the amputation of hand. But the second injunction has given rise to doubt as to the application of the former injunction for the Prophet's Tradition declares that the son as well as his belongings is the father's property. If the father steals anything belonging to his son he does not, according to the injunction of the *Shariah* and for that matter according to the law, commit larceny.

The test of injunctive or proprietary doubt is the existence of a proof in the *Shariat* negativing the illegitimacy of an act. The agents own guess in this respect does not count; for his

1. *Sharh Fathul Qadeer* Vol.4 PP.140 - 141.
2. The Hanafite Jurists reckon the doubt involved in an act as one of the eight forms of the offence of adultery. One of them is that sexual relationship with a woman divorced thrice. But the other three schools of jurists do not recognize doubt. They do not concede doubt in the act of adultery.

suspicion as to whether or not he is being guilty of larceny carries no weight since the illegitimacy of an act becomes doubtful in case a proof of the lawfulness thereof does exist.[1]

Again, Imam Abu Hanifa identifies a third category of doubt. According to him, doubt also arises when a contract is executed, even if such a contract relates to an unlawful act and the offender is alive to the illegitimacy thereof. But his companion and the other four *Imams* do not acknowledge doubt involved in an act as long as the culprit does not believe in its legitimacy.

In short according to Imam Abu Hanifa there are three kinds of doubt:—

(a) Doubt inherent in the act.
(b) Doubt inherent in the place.
(c) Doubt inherent in the contract.

(181) Effects of Invalidation of Hud in Case of Doubt

A number of effects follow from the implementation of the principle that doubts invalidate *hud.* Sometimes the operation of this principle does not only nullify the *hud* but leads also to the acquittal of the offender of the charge leveled against him. Besides, sometimes it happens that the operation thereof invalidates the *hud* alright, but it is replaced by a penal punishment.

There are three conditions in which an offender is exculpated:

(i) In case if any element of the offence imputed to him is doubtful. For instance a woman other than bride comes into the bed-room and bridegroom mistaking her for his wife has sexual intercourse with her. The man in such a case is liable neither to the *hud* for adultery nor to penal punishment. On the contrary he will be acquitted because of the absence of the intention to commit the offence on his part, which constitutes an essential element of an offence. Again, a man stealthily takes away his own thing mistaking it for one belonging to someone else. He will neither be awarded the *hud* for larceny nor any penal punishment, inasmuch as an essential condition of larceny is that the thing stolen must belong to another person.

(ii) When there is doubt in the application of the provision forbidding the act imputed to the accused; for example, in the case of nuptials without witnesses and without the consent of

1. *Sharh Fathul Qadeer* Vol.4, PP.141 & 142.

guardian or provisional marriage *(muta')*. For acts like these neither the *hud* for adultery nor penal punishment will operate inasmuch jurists disagree in such cases of marriage, i.e. some of them declare these cases lawful while others treat them as unlawful. The difference among the jurists imply that in the above acts the application of provision enjoining the *hud* for adultery involves doubt, which necessitates the acquittal of the accused.

(iii) When the proof of charge is doubtful. For instance, two witnesses testify to the accused being guilty of drinking liquor. But the witnesses later back out, while there is no evidence to prove the charge. An element of doubt thus creeps into the case because of the possibility of the witnesses telling the truth in deviating from their original deposition. Consequently, the *hud* for 'zina' (adultery) is invalid. Take another example. A man is said to be having occasional fits of mental disequilibrium. This man is alleged to have turned a renegade or is guilty of theft. It could not be ascertained if he has committed the theft in a state of sanity or when he had a fit of madness. As his condition involves doubt he will be exculpated of the charge levelled against him. The reason is that he may be suspected to have committed the crime imputed to him in a state of irresponsibility (insanity).

Apart from the above three possibilities, in all the other circumstances wherein the general principle under consideration is applicable, penal punishment will be awarded along with the annulment of the relevant *huds,* regardless of the kind of the cases of doubt. For instance, if the father steals the son's property, the relevant *hud* will not operate since the Holy Prophet (S.A.W.) has said, "You and your property belongs to your father." But the father will get penal punishment all the same. Here invalidation of *hud* owes itself to the injunctive doubt or the doubt inherent in place. Other cases of the like nature are as follows:

A man contracts a tabooed woman into marriage or acquires a woman on hire for adultery. According to Imam Abu Hanifa relevant *hud* in such a case will be invalid but the agent will get penal punishment. Again, a person steals such an immaterial thing as earth or anything essentially legitimate to be exploited by all. Imam Abu Hanifa holds that the *hud* in this case will not operate inasmuch as the thing is worthless, but penal punishment will be awarded.

Similarly Imam Abu Hanifa would treat the prescribed *hud* as invalid for one who steals the door of a mosque, inasmuch as it is unprotected.

Again, doubt arises about a person charged with larceny as to whether or not he had attained the age of puberty at the time of committing the offence. Such a person would be liable to penal punishment and not to *hud*.

Once more, a person confesses that he has committed one of the *hud* crimes but there is no proof other than his own confession Such a person will be sentenced to *hud*. But if he goes back on his confession, this would introduce an element of doubt into the case, thereby invalidating the *hud*. However, he would be liable to penal punishment. The difference between the backing out of an offender and a witness is that the former will get penal punishment for withdrawing his confession whereas the witness will incur no punishment for the subsequent denial of his own statement. This difference springs from the fact that no man as a rule would confess a crime which he has never committed while it is easy to accuse a man of an offence that he is not guilty of. However, if it is established that the accused has been forced or threatened to make confession, it will be incumbent on the court to acquit him, for a confession made under duress would be invalid. Hazrat Ibn-e-'Umar (R.A.A.) narrates the following Tradition of the Prophet (S.A.W.) in this context

> "No man is responsible for his own self when he is starved frightened and bound up."

Confession constitutes proof because it tends to contain truth. But confession forced by violence is a false confession. Going back on true confession gives rise to doubt invalidating the relevant *hud*, but in spite of this the element of truth in confession would be treated as predominent and thus it would be considered sufficient ground for awarding the accused penal punishment, although such a confession may not warrant the stance of *hud*. At any rate it depends on the court to award penal punishment if it so deems fit or else it may acquit the accused.

(182) Does the Principle of invalidation of *Hud* by Doubt apply to penal crimes?

The doctrine of invalidation of *hud* on grounds of doubt

essentially pertains to offences entailing *huds,* but there is nothing inhibiting the application thereof to penal crime's; for this doctrine is designed to ensure justice and guarantee to safeguard the interests of the accused.

So far as penal offences are concerned, the principle in question will, however, apply in those three cases wherein the offender will be acquitted owing to the application thereof. It will not be extended to cases wherein penal punishment is substituted for a *hud,* inasmuch as penal punishments are not pre-determined but depend on the discretion and the individual judgement of the judge. On the contrary, punishments for *hud* offences are invariably determined, requiring strict and *rigorous* execution. The Court has no powers to put off the operation of *huds* or substitute them for other punishments, except in case the *hud* is invalidated by doubt.

SECOND PRINCIPLE

(183) To Err in Forgiving is Preferable

One of the general principles of the Shariah is that it is better to err in forgiving rather than to punish by mistake. The following verdict of the Holy Prophet (S.A.W.) in this context is clear:

> "It is better if the Imam errs in forgiving than if he errs in punishing."

This doctrine means that it is wrong to pass a sentence unless the crime the accused is alleged to have committed is established and the provision declaring the crime an unlawful act does not apply thereto. But if there is an element of doubt in the evidence produced in support of his guilt or the application of the provision declaring the act constituting the offence unlawful involves doubt, then it is essential to acquit and pardon the accused: for in case of doubt acquittal of the offender is advantageous to the community as a whole and satisfies the demands of justice more than punishment of a guiltless person in a doubtful case.

The doctrine that it is better to forgive than punish by mistake applies to all the categories of crime including those entailing *huds qisas diyat* and penal punishments. It may be said that invalidation of huds on grounds of doubt, by dint of its

significance, constitutes the practical application of the principle that forgiving by error is preferable in those cases at least which requires acquittal of the accused and invalidation of *huds.*

(184) Modern Laws and Islamic Shariah.

Modern laws in general follow the same rule of construing provisions as the Islamic Shariah. These laws tend to limit the powers of the court in the interpretation of criminal provisions although the courts themselves are inclined to have wider powers in consideration of practical needs as well as in the public interest. That is why they have provided for a clause requiring obligatory confession of theft so that the public might be protected against the kinds of larceny that do not fall under the provisions admitting of limited interpretation. Thus the courts treat electricity as immovable property in order to award prescribed punishment of theft to those guilty of stealing energy. Similarly they have laid punishment for shroud - stealers as well. The rule followed by the modern courts in this respect is the very rule which Islamic *Shariat* observes.

Under the modern law every doubt is construed in favour of the accused. Consequently his punishment is either reduced or remitted altogether. For instance if the court doubts whether a case of forced larceny constitutes total coercion or not, the relevant provision is construed in such a way that the accused gets the benefit of doubt and by treating his offence as minor he will be awarded lighter punishment. Again, if the court is in doubt about the proof of a charge or about the totality of an ingredient of the offence the accused is alleged to have been guilty of, he will be acquitted.

From the foregoing discussion it is evident that the benefit of doubt given to the accused in the modern law is parallel to the two doctrines of the Shariah to the effect that doubts invalidate *huds* and that to err in forgiving is better than to err in punishing. Again, the conclusion drawn in the modern law from the principle of the benefit of doubt are identical with those drawn from the two principles of the Shariah mentioned above.[1]

1. *Al Badavi, Al Qanoon-ul-Janai,* PP.106 & 110.
Kamil Mersi, Saeed Mustafa, *Sharh Qanoon-ul-Uqoobat,* PP. 114 & 115.

—D—

CONFLICT OF PROVISIONS AND ANNULMENT THEREOF

(185) Conflict

If two injunctions of the same order such as two verses of the Holy Quran or one verse and one repeatedly narrated Tradition *(Sunnat Mutawatira)* or two such Traditions or two well-known Traditions *(Sunnat Mashoorah)* or two Traditions *(Sunnat A haddah)* reported by one narrator each are in conflict and the dates of their revelation or issuance being known, then the subsequent one would nullify the preceding injunction. But if the dates of the emergence of injunctions is not known, then preference would be given to an injunction by one of the standards of priority. There are two standards of preference

(i) *Textual and*

(ii) *Authoritarian*

Thus the injunction which is stronger in accordance with the text would be preferred. Textual meaning would be preferable to suggestive meaning. Substantive meaning would be preferred to construed sense. Similarly general meaning would be preferable to specific sense. And on authoritarian basis that peace of intelligence would be preferred which is given by jurists and the custodians.

If the chronology of two discordant provisions is not known nor does any other ground exist to prefer the one to the other and thus they are not amenable to disposition and accommodation, the other alternative would be to cease reasoning on the basis of such provisions and resort, instead, to provisions of lesser order. For instance, if two repeatedly narrated Traditions are in conflict, both of them should be abandoned and traditions reported by only one narrator should replace them as the basis of deductive process.

In the procedures of preference, disposition and accommodation, it should be ensured that the general principles of the Shariah and the spirit thereof is not violated so that comparison between the grounds of reasoning may not be incompatible with the tenets and aims envisaged by the lawgiver.

(186) Revocation of Provisions.

By revocation is meant total or partial suspension of a *Shariat* injunction by proving that expediency requires such action explicitly or implicitly.

Explicit revocations is the promulgation of a new law which unequivocally nullifies the existing law. For example, the initial punishment for adultery was life detention within the four walls of the house and torture. Such an injunction, for example, is the following verse of the Holy Quran:—

"As for those of your women who are guilty of lewdness. Call to witness four of you against them. And if they testify (to the truth of allegation) then confine them to the houses until death takes them or until Allah appoints for them a way (through new legislation)."

"And as for the two of you who are guilty thereof, punish them both. And if they repent and improve turn aside from them Lo! Allah is relenting merciful." (4:15-16)

This verse is clearly revoked by the following divine decree:

"The adulteress and the adulterer scourge ye each one of them with a hundred stripes." (24:2)

The following mandate of the Holy Prophet also repeats it:

"Take ye this divine commandment from me. God has prescribed this way to deal with women (lewd ones). Scourge the unmarried woman (adulteress) with a hundred stripes and banish her for one year and scourge the married woman with a hundred stripes, and stone her besides."

Another example of explicit revocation is this Tradition of the Prophet (S.A.W.):—

"I forbade ye to visit graves, but now bid ye visit them, for visiting graves would make you mindful of the Hereafter."

Implicit revocation of a provision consists in the promulgation of a partial law by the lawgiver which does not clearly rescind the existing provision but whose details are so inconsistent with

those of the existing law that the two provisions do not admit of accommodation and as such it would be essential to rescind either of them. In such a case a subsequent law would revoke the one chronologically preceding it. Total revocation means that nullifying provision annuls in its entirety the existing provision so that it covers all the obligated individuals.

Partial revocation implies that the existing law is applicable to all the individuals in general, but nullifying provision excludes some individuals from the scope of its operation.

(187) The Object of Revocation

Revocation is occasioned by legal provisions. However, all the provisions of the Quran and *Sunnah* do not admit of revocation in a manner that every provision preceding in time repeals every provision following it. Some provisions are invariable and as such admit of no revocation on any account. Such provisions are as follows

(i) **Provisions consisting of fundamental injunctions.** For instance provisions enjoining belief in Allah, the Holy Prophet (S.A.W.) and the Hereafter, as well as, those relating to the principles of belief and worship, enjoining adherence to truth, justice, honesty and other cardinal virtues. Besides, provisions of fundamental nature comprise injunctions forbidding the most nefarious acts of ascribing plurality to the Godhead, unwarranted murder, adultery, larceny, causing disruption in the land, oppression etc.

(ii) **Provisions comprising perpetual injunctions:**

For instance, the following divine decree pertaining to those who calumniate honourable women.

"Never accept their testimony" (24:4)

(iii) **Provisions comprising allusions to the past events and incidents;**

For instance the following verse of the Holy Quran:

"As for the *Thamud* they were destroyed by Thunder." (69.:5)

Or the following Tradition of the Holy Prophet (S.A .W.):

"The enemy was overawed by me a month in advance."

The reason for the irrevocability of such provisions is that revocation would give the lie to the information contained therein, whereas it is not possible to belie the lawgiver.

The kinds of provision mentioned above are not amenable to recession. But all the other provisions are revocable.

(188) The Temporal Aspect of Revocation

So far as the Quran and *Sunnah* are concerned revocation of their provisions is applicable only to the time when the Islamic law was being revealed and promulgated. This process of revelation came to an end with the demise of the Holy Prophet (S.A.W.). Thereafter, all the provisions of the Quran and *Sunnah* assumed the status of last word and thus became invariable. They admitted of no modification, nor was there any occasion to amend them; for subsequent to the Prophet's demise and the cessation of revelation there was no supreme authority competent to alter the injunctions revealed by Allah.

(189) Provisions that could revoke Provisions

A general principle of the Islamic *Shariah* is that a provision can only be revoked by another provision of the same order or by a stronger one. Provisions of lesser order or weaker provisions cannot nullify higher or stronger provisions. The springs of Islamic *Shariah* lie in the Holy Quran, the *Sunnah* consensus, analogy and rules and regulations framed by the people in authority. However the basic sources are only two: the Quran and the *Sunnah.* These are the two sources which provide the foundation of Islamic *Shariah* and from which the general and particular injunctions thereof are inferred. The other sources do not provide any new foundation; nor are any general and special injunctions derived therefrom. In face, these secondary sources are only the means by which corollaries are drawn from the injunctions of the Quran and the *Sunnah.* Hence they cannot serve to establish injunctions that are inconsistent with the Quran and *Sunnah.* In fact injunctions emanating from these sources shall have to be in harmony with the Quran and *Sunnah* from which they should actually be inferred. This principle applies to consensus and analogy as well as to the regulations promulgated by the authorities. For consensus is based

on the agreement of scholars upon such injunctions as are in tune with the provisions of the Quran and *Sunnah* Where such provisions do not exist the injunctions so agreed upon should be in conformity with the general principles and the spirit of the *Shariah*. Analogy consists in the deductive process of linking an injunction not provided for in the Quran and *Sunnah* with one provided for. And the Laws and regulations promulgated by the people in authority are based on the provisions of the Quran and *Sunnah*. Rules and laws unsupported by the injunctions of the Quran and *Sunnah* are not binding at all and it is not obligatory to obey the authority issuing such laws and regulations.

From the foregoing Statement it is clear that the springs of the Islamic law lie in the Quran and *Sunnah* and these constitute the sources of the highest order and the strongest of all the sources. All the other sources of the *Shariah* are governed by the Quran and the *Sunnah* and as such are grounded therein. Hence the Quran and *Sunnah* are the real sources of the *Shariah* while all the other sources are ancillary thereto. Evidently, no *corollary* can be of the same order as the original law or the one superior to it. That is why it is not possible to revoke the Quranic or the *Sunnat* provisions by consensus analogy or the laws and regulations promulgated by the people in authority[1].

Traditions not narrated repeatedly by the multiplicity of reporters can revoke each other inasmuch as they are of the same order. The Quranic injunctions and the Traditions narrated repeatedly may rescind Traditions not narrated repeatedly; for the Quran and the *sunnah* established by repeated narration are superior to and stronger than the latter. But a Traditions not narrated repeatedly by the multiplicity of reporters is incapable of revoking a Quranic provision or a *sunnah* repeatedly reported by myriad narrators, as a weaker and inferior provision cannot revoke one which is superior and stronger.

With the demise of the Holy Prophet (S.A.W.) all the provisions crystallized intact; for when revelation came to an end and the process of divine legislation discontinued, all the provisions of the Quran and *Sunnah* became invariable. Thus the

1. (a) *Al-Ghazali, Al Mustasfa* Vol. 1 Page 126.
   (b) *Fawateh-ul-Rehmoot fi Sharh Musallimus-Saboot* Vol. 2, PP. 84.

door of revocation was closed and consequently a comprehensive law came into being. In accordance with this comprehensive and crystallized law the particular began to be explained by the general and the relative by the absolute in a way as if the entire corpus of *Shariah* was revealed in its final form at once.

(190) Consensus and Analogy Repugnant to Quran and *Sunnah* invalid.

In is improbable that any consensus or analogical deduction would be contradictory to the Quran and *Sunnah*. Consensus must[1] proceed from the Quranic grounds. If there are no grounds in the Quran thereof, consensus cannot come about. Thus as it is essential for consensus to be supported by a proof from the Quran and *Sunnah*, the question of its being incompatible with divine decrees or edicts of the Holy Prophet (S.A.W.) does not arise, unless, of course, it is the consensus of scholars unacquainted with the Quran and *Sunnah*. As such it is not characterized as legal from the Islamic standpoint and, therefore, ineffective. Obviously this manner of *ijtehad* does not hold good.

Similarly it is also not conceivable that analogical deduction would be repugnant to the Quran and *Sunnah* provided that in such a process of deduction all the conditions laid down for drawing analogy are fulfilled. The raison d'ltre of analogy is to link an injunction not provided for by Allah and the Prophet (S.A.W.) with that provided for on grounds of the identity of the cause thereof. Hence injunctions deducted analogically should necessarily, he consistent with the divine provisions and the Prophets Traditions. Any analogical deduction which is not in harmony with the Quran and *Sunnah* would be invalid since it would cut at the very roots of analogy which, as an essential condition, requires that the competent scholar should primarily take into account the Quranic and Traditional provisions and should on no account depart therefrom and also that he should invariably cling to the aims of the lawgiver and the spirit of the *Shariat*.[2]

1. *Fawate-ul-Rehmoot fi Sharh Musallimus-Suboot* Vol. 2 PP 238
2. Please See Article No.15, 135, 169, 175.

D. Relationship between *Shariat* Provisions and Legal Provisions.

(191) Laws And Regulations Contradictory To Quran And Sunnah.

If the laws and regulations promulgated by a Muslim. Government are consistent with the general principles of the *Shariah* and the spirit of Islam, they ought to be abided by and those found guilty of their infringement are to be punished. But if such laws and regulations are contradictory to the injunctions of the Quran and *Sunnah* and in conflict with the general principles of the *Shariah* and the-spirit of Islam, they are invalid. In this case they are not binding on any one. In fact it is incumbent upon every Muslim to oppose them.

One shall first take up the question of the invalidity of matters and provisions inconsistent with the *Shariat* and then try to throw light on the reasons for their invalidity.

(192) The Concept of Invalidity in the Islamic *Shariah*

The concept of invalidity in *Shariah* is based on the fact that its injunctions and prohibitions are not vain. Almighty Allah has revealed His Book and sent His Messenger to be obeyed and followed. Hence an action consistent with the law brought by the Prophet (S.A.W.) is right and one incompatible therewith is wrong. Wrong action is invalid inasmuch as it militates against the will of the lawgiver says Allah:

> "We sent no messenger save that he should be obeyed by Allah's leave." (4:64)

Again,

> "So accept whatever the Prophet gives you and abstain from whatever he forbids you." (59:7)
>
> Yet another verse to the same effect:
>
> "O ye who believe Obey Allah and obey the Messenger." (4:59)

The *Shariat* concept of invalidity is applicable to each and every individual as well as to the community as a whole. It applies to the actions and undertakings of both the ruler and the ruled. Hence any action and undertaking in harmony with the

provisions and general principles of the *Shariah* and the spirit of Islam is valid and any action and undertaking incompatible with them is totally and intrinsically invalid. In consideration of the fact that such an action is vain and ineffective, every regulation, law or order that is in conflict with the *Shariah* is absolutely invalid. Similarly every act of worship which is not according to the rules of the *Shariah* is futile. In the same way every undertaking and contract discordant with the *Shariat* is totally invalid. In short, there are two kinds of actions ! the one consistent with *Shariah* which is valid and the other inconsistent therewith which is invalid. This is the view held by most of the jurists.

But the position of the Hanafites in this respect is a different from the majority of jurists. This school of Islami (jurisprudence does agree with the majority as regards matters relating to the community and treat all such laws and regulations invalid as are in conflict with the provisions of the *Shariah*. Similarly they regard all such matters relating to individual undertakings and contracts as legitimate than accord with *Shariah*. Besides the Hanafites also hold that if matters are inconsistent with *Shariah* or any element of the contract or undertaking is act of order, then such a contract and undertaking is absolutely invalid.

But the Hanafites would regard corruptive and not invalid a contract or undertaking if any of its features, that is any condition thereof which does not form an essential part or element of the contract or undertaking that comes into conflict with the *Shariah*. The difference between invalid and corruptive is that the former is absolutely ineffective, while the latter does produce certain effects[1].

When this doctrine of invalidity is brought to bear on all kinds of laws, regulations and mandates, it may be said that all such promulgations made under various names as are inconsistent With the provisions and general principles of the *Shariah* and the spirit of Islam are absolutely invalidity the cause of their invalidity is their repugnance to the *Shariah*. This is the view held by most of the jurists. Imam Abu Hanifa and his followers, too, treat as

1. (a) *Al Amadi, Al-Ahkam fil Usoo-lil-Ahkam,* Vol. 1, PP. 186, 187
   (b) *Al Ghazali, Al-Muatasfa* Vol.1, PP.94.
   (c) Abdul Wahab *Khallaf-Usool-ul Feqah,*P. 709

absolutely invalid all such laws regulations and matters pertaining to public interest and collective peace and tranquillity or, according to their interpretations, pertaining to rights of Allah as are contradictory to *Shariah*. In other words the consensus of the jurists is that the basis of invalidity of laws, regulations and orders is inconsistency with the provisions and general principles of the *Shariah* and the spirit of Islam.

(193) Grounds of Invalidity of Modern Laws Inconsistent with *Shariah*.

As has already been stated, the *Shariat* doctrines of invalidity requires that all the man-made legislation's incompatible with the Islamic Law should be declared null and void. We now proceed to show that this doctrine is grounded in the injunctions of the Quran and *Sunnah* as well as in the consensus. These three, as we know, are the sources of the criminal law of Islam. The injunctions of the Quran and *Sunnah* as to the invalidity of matters inconsistent with the *Shariat* are crystal clear. From these unequivocal injunctions also stems the consensus that matters contradictory to the *Shariat* are null and void. The reasons are as follows:

(i) Allah has enjoined adherence to *Shariah* and abstinence from aught incompatible with the provisions and general principles thereof and the spirit of Islam. All things that militate against the clear injunctions of the Quran have been declared unlawful. Allah has determined two courses of action.

(a) Obedience of Allah and His Prophet (S.A.W.) and adherence to the *Shariah* brought by the Prophet (S.A.W.) and (b) to be actuated by desires and lust. According to the Quran any order or mandate out of tune with a provision of the *Shariah* springs from passion. Says Allah:

> "And if they do not obey Thee, then know that what they follow is their lusts. And who goes farther astray than he who follows his lust without guidance from Allah? Lo! Allah guideth not wrong-doing folk." (28:50)

Similarly Allah divides the methods of government into two kinds:The one in conformity with the divine revelation and the other inconsistent therewith. Says Allah:—

> "O David! We have set thee as a viceroy in the earth; therefore, judge aright between mankind and follow not desire that it beguile thee from the way of Allah. Lo! Those who wander from the way of Allah have an awful doom inasmuch as they forgot the day of Reckoning." (38:26)

Again,

He addresses the Holy Prophet in the following words:

> "And now have We set thee on a clear road of our commandment; so follow it, and follow not the whims of those who know not."
>
> "They can avail thee naught against Allah. And Lo as for the wrong-doers, some of them are friends of others; and Allah is the Friend of those who ward off evil."
>
> (45:18-19)

Here a line of distinction has been drawn between the Islamic *Shariah* and the desires of the ignorant people. It has been said about the Islamic *Shariah* that it is the law of Allah revealed to His Prophet (S.A.W.) and as such is binding upon the *Ummah*, and at the same time it has been enjoined to restrain from following desires.

Again,

> "Follow what has been revealed to you from your Lord and do not follow guardians beside Him; how little do you mind." (7:3)

In this verse it has been enjoined upon the believers to act on the injunctions revealed by Allah and not to follow those which He has not revealed. The man who follows injunctions other than those sent by Allah is guided by Masters other than Allah.[1]

In short, the Quranic injunctions are positive in forbidding all such things as are clearly contradictory or are incompatible with the general principles thereof and with the spirit of Islam. These injunctions clearly prohibit obedience of any edict that is not included in the *Shariah* and the person following anything other than the provisions of the *Shariah* has been described as the Slave of desire, misguided, misguiding, transgressor disbeliever and one serving masters other than Allah.

1. *A 'alam-ul-moqi'een*, Vol.1, p.56.

(ii) Allah does not allow any believer to obey the command of any one other than Allah or consider binding any law except the one revealed by Him. In fact, Allah enjoins that every command save His own should be rejected. Any one satisfied with the commands of one other than Allah is misled and obeys Satan. Says Allah

> "Hast thou not seen those who pretend that they believe in that which is revealed unto thee and that which was revealed before thee; how they would go for judgment (in their disputes) to false deities when they have been ordered to abjure them? Satan would mislead them far astray."
>
> (4:60)

In other words, a person who abandons the law revealed by Allah and propagated by the Prophet (S.A.W.) and regards some other law as binding, owes allegiance to a false deity. Obedience of a false deity means to exceed one's limits. The false deity of every group is that which that group follows in its affairs instead of obeying Allah and the Prophet (S.A.W.) and which it worship in place of Allah. Also a false deity is one which a group follows without guidance from Allah or which it follows in such matters that fall within the sphere of obedience to Allah without knowing it. In other words, any person believing in Allah cannot believe in any one other than Allah; nor can he or she owe allegiance to any one other than He.[1]

(iii) Allah does not allow any believer, whether, male or female, the choice of anything which Allah does not chooses for him or for her a person who chooses any thing that does not accord with the choice of Allah is misguided and has no faith in Him:

> "And it behoves not a believing man and a believing woman that they should have any choice in their matter which Allah and His Apostle have decided it for him or her."
>
> (33:36)

Since Allah enjoins adherence only to the law revealed by Him to the Prophet (S.A.W.) and orders to abstain from abiding by any other law, it is not becoming in a believer to accept the injunctions of any one other than Allah. If he agrees to abide by such injunctions, he is no believer worth the name.[2]

1. *Aa'lam-ul-Moqi'een,* Vol.1, p.56. 2. *Aa'lam-ul-Moqi'een,* Vol.1, p.57.

(iv) Allah forbids the believers to express their opinions before the Holy Prophet (S.A.W.), make their observations or act in a certain manner, and raise their voices louder than the voice of the Prophet (S.A.W.):—

> "O ye who believe ! Be not forward in the presence of Allah and His Messenger and keep your duty to Allah. Lo! Allah is hearer, knower." (49:1)

What this means is that the believers should refrain from saying anything before the Prophet (S.A.W.) has spoken, from commanding before he has commanded, from taking any decision before he has decided and from ordering an action before he has ordered it himself.

Says Allah:—

> "O ye who believer! Lift not up your voices above the voice of the Prophet nor shout when speaking to him as ye shout to one another, lest your works be rendered vain while ye perceive not." (49:2)

If speaking louder than the Prophet (S.A.W.) nullifies one's actions, what would happen if one prefers one's own opinion, wisdom, liking and policies to that of the Holy Prophet? One who dares do this would certainly jeopardise the reward of one's actions.

(v) Again Allah Says:—

> "They only are the true believers who believe in Allah and His Messenger and when they are with him on some common errand, go not away until they have asked leave him."
>
> (24:62)

Allah makes an article of faith for the Muslims to obtain the Prophet's permission if they want to leave him when accompanying him on some mission. Hence faith also demands that believers should abstain from making an observation, taking a course of action or adopting a political or academic position but with the Prophet's permission. By his permission is meant to adhere to the law given by him. If a course of action is incompatible with this law and a believer adopts it notwithstanding, his faith and good acts would end in smoke and he would suffer great loss both in this world and in the Hereafter. The following verses of the Holy Quran to this effect are clear:—

(ii) Allah does not allow any believer to obey the command of any one other than Allah or consider binding any law except the one revealed by Him. In fact, Allah enjoins that every command save His own should be rejected. Any one satisfied with the commands of one other than Allah is misled and obeys Satan. Says Allah

> "Hast thou not seen those who pretend that they believe in that which is revealed unto thee and that which was revealed before thee; how they would go for judgment (in their disputes) to false deities when they have been ordered to abjure them? Satan would mislead them far astray."
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"Whoso judgeth not by that which Allan has revealed such are disbelievers." (5:44)

"Whoso judgeth not by that which Allah hath revealed: such are wrong doers." (5:45)

"Whoso judgeth not by that which Allah has revealed: such are evil-doers." (5:47)

The commentators of the Holy Quran are agreed that nations in the past renounced the divine commandments and made their own laws and rules with the result that Allah branded them as disbelievers, transgressors and evil-doers.

Commentators are also agreed that so also would it be the case with the Muslims today if they aberrate from the God gifted law and make their own law and regulations, abandon the *Shariah* and abide by the laws framed by themselves unwarranted by the provisions of the *Shariah* and believing in such laws. If a person deviates from the punishments for theft slander and adultery prescribed in the *Shariah* on the plea that man-made punishments are preferable to them is definitely a disbeliever. If obtaining verdict from what is other than Allah is not only based on denial of divine law but violation of right by aberration from principles of justice and equality then he is a transgressor and wrong doer.[1]

(vi) A Muslim is disallowed to believe in anything not revealed by Allah or relinquish Allah's command to accept the command of someone else. It is improper for a believer even to try to harmonize the divine injunctions with the edicts of anyone other than Allah or point out agreement of a divine injunction with the injunction of a false deity or demand of passions; for this course of action amounts to implicit infidelity and flagrant hypocrisy. It is therefore, incumbent on every Muslim to oppose such an attitude and shun the company of those who adopt it. Belief in Allah and the Holy Prophet (S.A.W.) does not only call for opposing such a nefarious attempt at harmonization tooth and nail but also necessitates a war against any method, belief political weltanshauung or position repugnant to the system brought by

1. (a) *Tafseer-ul-Manar*, Vol.6, p.145
   (b) *Aaloosi, Roohul Ma-ani* Vol.10 p.145.
   (c) *Tafsseer-ul-Tabari;* Vol.6, p.119
   (d) *Tafseerul Qurtubi* Vol. 6, p.150.

the Messenger of Allah; and such a war should be waged relentlessly until the way of life enjoined by Allah is enforced; the claims of disbelievers are falsified and the faith in Allah is finally triumphant.

The following verse of the Holy Quran speaks of those who prevent the people from treading the path of Allah and try to accommodate His faith with something else:—

"And when it is said unto them come unto that which Allah hath revealed and unto the Messenger thou see at the hypocrites turn from thee with aversion. How would it be if a misfortune come them because of that which their own hands have sent before them? Then they come unto thee swearing by Allah that they Were seeking naught but has harmony and kindness. Those are they the secrets of whose hearts Allah knoweth. So oppose them and admonish them and address them in plain terms about their roads."

(4:61-63)

(vii) Allah swears by Himself to reject the faith of the people if they do not accept the verdict of the Holy Prophet (S.A.W.) in every big and small matter. It is not enough for them the judgement of the Prophet (S.A.W.). They are rather required as an essential condition of their faith to accept and submit to the Prophet's verdict with reluctance or resentment. They must bow before it with pleasure and with a full sense of obedience. Obviously, the Holy Prophet (S.A.W.) gives only verdict revealed by Allah. Thus the believer is under the obligation to accept divine mandates with the full confidence that every one of them is superior to any human edict. Although the people persistently maintain that the *Shariah* is out of tune with the zeitgeist, no person can be a believer in the real sense of the word until he does not submit without reservation and owes unqualified allegiance to Allah and the Prophet (S.A.W.), as has been laid down in this verse of the Holy Quran:

"But may, by the Lord, they will not believe in truth until they make thee judge of what is in dispute between them and find within themselves no dislike of that which thou decidest and submit with full submission." (4:65)

1. *Aa'lam-ul-Moqi'een* Vol. I p.57.

The jurists argue on the basis of the above verse that one who rejects any of the injunctions of Allah and that of the Holy Prophet (S.A.W.) stands excommunicated, whatever the reason for his rejection, i.e. whether he is skeptical about the injunction or he does not want to accept or wants to evade it. That is why those who were averse to the payment of *Zakath* were declared apostates *by* the companions of the Prophet (S.A.W.)[1] for God Himself expels such people from the community of the faithful who refuse to submit to the law brought by the Prophet (S.A.W.) and reject his decisions and edicts.

(viii) Every act incompatible with-the *Shariah* is unlawful for the Muslims, whether the ruling authority permits or even orders such an act; for the power of legislation by the authority is limited by the condition that the legislation should be in conformity with the *Shariah* and in harmony with the general principles and spirit of Islam. Things forbidden by the *Shariah* can never be lawful if the authority arrogates to itself the power of framing and promulgating laws incompatible with the *Shariah*. Things prohibited by the *Shariah* will continue to be unlawful for every Muslim man and woman and it will be wrong on the part of a Muslim to abide by such *anti-Shariat* laws, apply them, order their execution or enforce them. In fact it will be incumbent on every Muslim to abstain from mandates and stop their execution, inasmuch as obedience of rulers as self consistent authority is not obligatory. They are binding only when they are issued for adherence to the Prophet's edicts and practice or are within the limits of the injunctions of Allah and His Messenger. Allah enjoins this in the following words:

> "O ye who believe! Obey Allah and obey the Messenger and those of you who are in authority: and if ye have a dispute concerning any matter, refer it to Allah and the Messenger if ye are in truth believers in Allah and the Last day. That is better and more seemly in the end." (4:59)

In this verse obedience of the Prophet (S.A.W.) is stressed twice meaning thereby that obedience to him is obligatory in itself permanently, even if whatever he commands is not provided for in the Quran for Allah says that the Prophet (S.A.W.) has been given not only the Book but the like thereof. In reference

to the people in authority, however, the word obedience, has been omitted which shows that compliance with their orders is subservient to the obedience of the Prophet (S.A.W.). Moreover, it may be understood by the precedence of reference to Allah and the Holy Prophet (S.A.W.) that compliance with the orders of the authorities presupposes the execution of the edicts of Allah and the Prophet and is, therefore, ancillary to the obedience of Allah and the Prophet. Only the obedience of those in authority is obligatory whose commands are in conformity with the *Shariah* Authorities that issue orders inconsistent with the *Shariah* are not to be obeyed.

(ix) The *Sunnah* lays down the limits for the obedience of authorities. It enjoins compliance with such commands as are in conformity with divine injunctions and forbids compliance with those inconsistent with the latter. Says the Prophet (S.A.W.):

> "Obedience of created beings is not obligatory in doing whatever infringe Allah's command."

Again.

> "Obedience is obligatory only in good deeds."

In the following Tradition the Prophet (S.A.W.) specifically refers to people in authority:—

> "Obedience of a man commanding commission of sin is not obligatory."

During the Prophet's life time a commander of the Muslim army issued an order which the soldiers did not carry out. Thereupon, the commander gathered wood and made a bonfire. He then asked his men "Has the Holy Prophet (S.A.W.) not commanded you to obey me?" They replied in the affirmative. The commander said, "Well then, I command you to walk into the fire." The soldiers thought that they should carry out the commanders order. But when the news of this incident reached the Prophet (S.A.W.) he said:—

> "Had these people entered the fire, they would never have come out of it."

By this the Prophet (S.A.W.) meant that they would have remained in hell for ever.

The above observation of the Prophet (S.A.W.) refers to the people who were prepared for walking into the fire with a

sense of submission to the commander believing such a step to be obligatory. But they erred in their *ijtehad* or deductive reasoning, and decided to comply with such a command of their leader which involved defiance of divine injunction. Hence they were apprised of their perpetual damnation. Those people took a wrong decision in a doubtful matter as the result of their erroneous *ijtehad*. If so, is it the case, about one who carries out an order in flagrant violation of a *Shariat* provision?[1]

(x) Soon after the demise of the Holy Prophet (S.A.W.) his companions agreed on the principle that obedience of the people in authority beyond the limits of the *Shariah* is not obligatory. When Hazrat Abu Bakr Siddiq (R.A.A.) assumed the office of the Caliph, he addressed the Muslims in the following words.

> "You should obey me as long as I enforce the commands of Allah. But when I violate His commands, my obedience will not be incumbent upon you."

In other words Hazrat Abu Bakr Siddiq (R.A.A.) declared obedience to himself conditional to compliance with the commands of Allah. If he ran the affairs of the Government in accordance with His injunctions, he must be followed, otherwise not.

The consensus of the jurists and the *mujtahids* of Islam is that the people in authority must be obeyed only in matters enjoined by Allah. But their obedience is not obligatory at all in matters contradictory to the Provisions of the *Shariah*[2]. In short, the jurists of Islam do not differ either in belief or in practice on this that in committing an offence against the Creator, obedience of created - being is not obligatory; that it would be apostasy and heresy to declare lawful what according to the *Shariah* is unlawful; as for example, adultery, use of liquor, suspension of the limits prescribed by Allah, repealing of the laws of *Shariah* and legalization of matters not provided for in the *Shariah* and that the Muslims are under the obligation to rebel against the authority who turns an

1. *Aa'lam-ul-Moqi'een* Vol.1 p.54.
2. (a) *Al Sharh-ul-Kabir,* Vol. 4, p.341.
   (b) *Sharh-ul-Durdeer,* Vol.4, p. 218.
   (c) *Al Muhazzab,* Vol.2, p. 180.
   (d) *Hasnia Ibn 'Aabedeen* Vol. 3, p. 429.

apostate or in a lesser degree defy such orders of the people in authority as are repugnant to the provisions of the Shariah.[1]

(xi) Under the provisions of the *Shariah* the people in authority have no powers of legislation whatsoever for reasons already specified. Their powers of law making are limited by two clauses which are as follows:

(a) Enforcing laws aimed at ensuring the enforcement of the provisions of the Islamic *Shariah.*

(b) *Organizing laws.* These laws are framed for the safeguard, organization and the fulfillment of the requirements of the society. Such laws generally relate to those matters on which *Shariah* is silent. They do not pertain to matters dealt with in the *Shariah.* But the primary condition of such laws is that they must be consistent with the general principles of the *Shariah* and the spirit of Islamic law. In other words they are designed to enforce the general principles of the *Shariah.* Hence they are in reality another category of enforcing laws.

(xii) People in authority with these limitations are the successors of the Prophet (S.A.W.) or the representatives of the *Ummah.* If they are to be treated as the successors of the Holy Prophet (S.A.W.), it is incumbent upon them not to overstep the limits of the *Shariah,* for the very purpose of their appointment to this office is to enforce the law given by the Prophet. If they are to be regarded as the representatives of the *Ummah,* even then it is not proper for them to go beyond the purview of a law wherein the entire *Ummah* believes. If they overstep the limits of the *Shariah,* they will cease to be the successors of the Prophet (S.A.W.) and the representatives of the *Ummah,* inasmuch as the *Ummah* elects them as its rulers, in order to enforce the divine faith and to run the affairs of the state on the basis of the *Shariah.* Whatever the grounds on which this limited power of legislation has been conferred on the people in authority, they are in any case under the obligation to adhere to the provisions and the general principles of the *Shariah* and the spirit of the Islamic law.

1. (a) *Tafseer-ul-Manar,* Vol.6 p.367.
   (b) *Al-Jassas, Ahkamul Quran* Vol.2, p.214.
   (c) *Al Aaloosi, Rooh-ul-Ma'ani* Vol.5, p.22.

(xiii) As we have learnt, the *Shariah* is the basic constitution of the Muslims. Anything that conforms to it is right and anything that infringes it is wrong, irrespective of the passage of time and the changes that may come about in the concepts of legislation. The *Shariah* brought by the Holy Prophet (S.A.W.) is the divine law that is applicable at all times and at all places. Besides, it is not bound by territorial, national or social limits. Its application is obligatory as long as it is not annulled. But the Islamic *Shariah* is not amenable to revocation; for one of the fundamental principles thereof and even that of the modern law is that no legal provisions can be revoked unless the nullifying provisions are of the same or higher order or such provisions are promulgated by the same law-maker, or the repealing legislator enjoys powers equal to or greater than those conferred on the legislator who might have made the provisions to be revoked. In other words the nullifying provisions should be no other than the injunctions of the Quran and the *Sunnah* themselves so that they may revoke the Quran and *Sunnah* that we have. But subsequent to the cessation of Prophethood the Quran can no longer be revealed; nor can anything be added to the *Sunnah* after the demise of the Prophet (S.A.W.); nor can it be said that the existing man-made law or legislative bodies are of the same class as the Quran and *Sunnah,* having the same powers of legislation as the latter. The truth of the matter is that our authorities do not have any powers of legislation. They are competent only to administer and execute. Legislation is the close preserve of Allah and the Holy Prophet. (S.A.W.). Subsequent to the discontinuance of revelation and the demise of the Holy Prophet (S.A.W.) the process of legislator has come to an end. The function of the people in authority now is to make rules and regulations and take measures designed to enforce the *Shariah* and adopt a procedure that must lead to mould social life according to the *Shariah.* Allah has Himself determined the fundamental elements of law and laid down the basic injunctions of the *Shariah* through the sayings of the Holy Prophet (S.A.W.). It is now the duty of the people in authority to promulgate such acts and enforce such regulations and decisions as may help in the translation of the fundamental legal elements of Islam into practice and raise a social edifice on the foundations of Islam.

But the authorities have no powers to hold in abeyance the fundamental legal elements of Islam or to refrain from enforcing, them since this is simply beyond their jurisdiction.

What has been stated above may well be illustrated by a comparison with the Modern law. In order to enforce this law the legislative bodies pass acts, rules and regulations. In other words the place of the *Shariah* in the legal system of Islam is similar to that of constitution in the modern system. Laws enacted by the legislature must conform to the provisions of the constitution. If these laws exceed constitutional limits, they are treated as invalid.

To sum up acts, regulations and verdicts are inferior to the Quran and *Sunnah* and it is not possible to prefer an inferior law to a superior one.

(xiv) The Egyptian Constitution provides that the official religion of the state is Islam. This provision implies that the Islamic system is the basis on which the affairs of the state will be run; that Islam alone is that the source and centre of reference; that only the commandments and prohibitions thereof must be pursued. Provision of a clause to this effect in the constitution of Egypt signifies further that we must adhere to the injunctions of the Islamic *Shariah* in all the spheres of our activities including law, politics education as well as internal and external affairs. We are bound to treat as lawful only what the *Shariat* declares lawful and treat as unlawful what the *Shariah* forbids. We should on no account overstep the limits laid down by the *Shariah* in our laws and our way of life.

A reference here to the Islamic clause in the Egyptian constitution, however, is not designed to indicate the necessity of enforcing the *Shariah* and of invalidation of the laws repugnant to Islam. All that we mean to show is what the clause in question actually requires.

In the actual situation obtaining today it makes little difference whether to mention Islam in the constitution or not. What really matters is whether or not Islam is conformed to in practice. Islam enjoins that no law except the *Shariah* should be acceptable to the Muslims. *Shariah* alone is the real constitution of Islam. Every other constitution, law regulation or verdict is invalid. According to the *Shariah* they are Worthless unless they are

consistent with its provisions and are not repugnant to its general principles and the spirit of its law.

(xv) The *Shariat* doctrine of repugnancy has been adopted with varied application in most of the countries where man-made laws are in force. In a majority of civilized countries every law, regulation or decision which is repugnant to the constitution is treated as invalid, inasmuch as constitution in itself constitutes the basic law. Hence no law, regulation or order must be contradictory to the constitution. The constituent body would be definitely superior to legislature in such countries, since specific conditions have to be fulfilled and the consent of a prescribed majority is required for framing the constitution which is not needed in making an ordinary law. However some civilized countries do not recognize this concept. They only differentiate between laws and other regulations and decisions. If the law in its legal form is complete, it is regarded as valid even if it is inconsistent with the constitution. But if a regulation, decision or order is inconsistent with the constitution, it is treated as invalid even if it is not legally defective. Those who subscribe to this view give the status of constitution to the laws; for the same body enjoying uniform powers makes and passes both the constitution and the laws. The body which issue regulations, decisions and orders is inferior to the constituent and legislative body and has also less powers.[1]

In short this doctrine of invalidity or repugnancy, if you like, underlies totally or partially in the modern laws as well. If we apply it totally or partially to the Islamic countries, we shall have to acknowledge that every law repugnant to the *shariat* is invalid even if it is legally complete in all respects, for *Shariat* alone is the basic constitutions of the Muslims and the maker of this constitution is Allah who is undoubtedly superior to His constitution-making servants.

Before concluding this discussion, we consider it necessary to point out that it is hardly a century since the doctrine of repugnancy was introduced into the modern law, whereas the *Shariat* had been acquainted with it twelve hundred years earlier. The *Shariat* can, therefore, be proud of the distinction of containing

1. Sec Article 132.

an element centuries before it emerged in the modern law. The concept which the people are so glad to have today for enabling them to guard against the encroachments of legislature actually owes its origin to the *Shariah*. If the people are ignorant of this and other merits of the *Shariat* it is their own fault. It is they who are to blame for being ignorant of the virtues of the *Shariat* while being well aware of the merits of the modern laws.

(xvi) The fact of being perfect in its legal form does not stand in the way of absolute invalidation of the contents of a law repugnant to the *Shariah*, for its formal perfection does not affect the invalidity of its contents and cannot make lawful of what is unlawful and make legitimate of what is void. It is therefore incumbent upon the courts not to put into effect such laws as are repugnant to the *Shariah* not withstanding their perfection in legal form.

(194) Extent of Invalidity of Repugnant Law

We have said that a law, regulation or decision repugnant to the *Shariah* is absolutely invalid. But this doctrine does not apply to all the provisions of a law, regulations and decisions. The sphere of its operation extends only to the provisions inconsistent with the *Shariah* since the grounds of invalidation is repugnance to the *Shariat*. Hence logically speaking such laws and provisions as are consistent with the *Shariah* will not be void even if they are incorporated in a law regulation or decision contradictory to the *Shariah*. Thus the provisions consistent with the *Shariah* are valid, provided that they have been passed by a proper legislative body and fulfil the requirements of the prescribed legal regulations. Since inconsistency with the *Shariah* is the criterion of invalidity of provisions, they are not invariably void. They are invalid only when they are repugnant to and valid only when compatible with the *Shariah* and this is not something uncommon, for the criterion of validity and invalidity is repugnance to and compatibility with the *Shariah* and applies to both the existence and now-existence of the cause of validity.

An example of the case of the same provision being Valid in one set of circumstances and invalid in another is provided by the crime of adultery. According to the *Shariah* adultery is

punishable by stoning if committed by a married person and by flogging if committed by an unmarried person. The term adultery as defined by the *Shariah* connotes the penetration of a part of glans penis into the vulua. If penetration is less than this penalty involved is penal punishment and not *hud*. Cases of adultery like kissing, embracing touching exciting etc. do not involve *hud*. Under certain circumstances even a complete act of adultery does not entail *hud*, e.g., when *hud* is invalidated by doubt or the offender is underage and, therefore, not liable to *hud*. In short, it will not be proper to apply the provisions of existing laws in cases of complete act of crime entailing *hud*, inasmuch as these provisions are incompatible with the injunction of the *Shariah*, which calls for stoning and flogging and the provisions in question do not lay down such punishments. However, in case of doubtful act of complete adultery wherein the *Shariat* hud does not hold good as well as in case of incomplete adultery the penal punishment as provided for in the existing laws is consistent with the *Shariah*, since the *Shariah* leaves the determination of penal punishment to the discretion of legislatures, and it is these bodies which provide for statutory punishments. Hence statutory punishments for acts that do not involve or prescribe hud will be treated as penal punishments. In other words statutory punishments are invalid where the *Shariah* lays down a *hud* and valid where it does not lay down a *hud* but enjoins penal punishment.

Again, under the *Shariah* habitual larceny is punishable by the amputation of hands. But *Shariah* provides at the same time that this punishment would be awarded only when the act of larceny is complete and fulfils all the conditions laid down for passing the sentence of *hud*. However, if the act of larceny is not complete and does not fulfil the specified conditions, the punishment thereof would be penal and the existing laws, too, provide for penal punishments. Hence in a case of habitual larceny involving the *Shariat hud* of amputation of hand, the existing provisions of law do not hold good and in cases where the *Shariah* enjoins penal punishments, the provisions in question are valid.

Slander is punishable under the *Shariah* by eighty stripes. But the kind of slander which entails such a *hud* consists of a false charge of adultery or refusal to acknowledge descent. Apart

from these two forms, no other kind of slander is punishable by the *Shariat hud*. Even the act of vituperation involves penal punishment rather than *hud*. Since the punishments provided for in the existing punitive laws are penal punishments, these provisions do not hold good in the case of slander entailing the *hud* prescribed by the *Shariah* but are valid in cases of vituperation for which penal punishment is prescribed. An important aspect of this qualification and ditferentiation is that the *Shariah* allows the right of defence to the slanderer whereas the law in force does not allow such a right.[1]

(195) Effects of Invalidity of Provisions Repugnant to *Shariah*

Treatment of provisions repugnant to the *Shariah* produces two effects

(i) *In Respect of Application:* The court is under the obligation not to enforce invalid legal provisions in cases wherein they are invalid. It should rather put them into effect where they can legitimately be applied from the standpoint of *Shariah*. The court should not refer to law and justify its action on the plea that the law does not confer on it the power of discrimination between validity and invalidity of provisions. For it is the *Shariah* and not the laws which confers such a power thereon.

There is no difference between the declaration of a legal provision repugnant to the *Shariat* invalid and suspension thereof by the court; for in the suspension of its operation the court would attribute its action to the invalidity of the provision in question by virtue of its repugnance to the *Shariah* and such a decision would be tantamount to passing a judgement on its invalidity. Although this decision is not included in the text of judgement, it is mentioned along with the reasons thereof. But being one of the basic reasons, it would be treated as if it forms a part of the judgement.

But the Court cannot acquit the accused on the grounds of invalidity of a legal provision in respect of the incident involved in the offence; nor can it acquit him on the ground that it is empowered under the law to award a particular punishment. Hence

1. See article 240. The onus of proving a change lies on the person bringing up the charge. Section 7 of *Egyptian Penal Law* is not in conflict with the rights allowed by the *Shariah*.

if the court cannot award punishment, it should acquit the accused inasmuch as the invalidity of legal provisions inconsistent with the *Shariat* is that the *Shariah* inhibits the application of such provisions and makes it obligatory to sentence the offender to the punishment prescribed by the *Shariah*. If we declare any section of the law nul and void under the provision of the *Shariah*, it would necessarily imply that we should take into consideration the *Shariat* provision in awarding punishment. That is why the court is under the obligation to sentence the offender to the *hud* prescribed by the *Shariah* instead of acquitting him.

If the court is satisfied that the relevant provisions of the law are repugnant to the *Shariah*, it should carry out its duty according to its belief and apply the relevant injunction of the *Shariah* straight away, regardless of the consideration whether or not its judgement would be enforced particularly when enforcement is beyond its jurisdiction and the executive is empowered to put it into effect. The executive is committed to enforce it. If the verdict of the court is final then the executive is obliged to enforce it.

(ii) The Court is not competent to give the ruling that the hearing of a criminal case is not within its jurisdiction. According to the provisions of the law passed by a legislative body the court is competent to hear such a case since the provisions limiting powers are valid only if they are passed by a body empowered to distribute judicial powers. The age old procedure of hearing the *hud* cases is unreliable inasmuch as judgement under the Islamic Shariah is relative to time and place and the man in authority is competent thereunder to distribute judicial powers. The *Shariah* confers on the criminal courts the powers regarding crimes in the same manner as the modern laws do.

Though the question of the division of judicial powers among the courts is based on the severity of punishment the legislature definitely specifies crimes falling within the jurisdiction of each court. Since the criminal laws do not inhibit the punishment laid down in the *Shariah*, we must take into consideration the nature of crimes on our own. If the crimes fall within the jurisdiction of partial courts, then the court will be competent to award punishment prescribed by the *Shariah* instead of one provided

for in the law on the grounds that the lawmaker is satisfied if the offender is awarded a punishment, but the lawmaker, at the same time, confers on the court the power of passing a sentence.

For the same reason cases of habitual larceny, slander and use of liquor fail within the jurisdiction of partial courts. However, cases of larceny with intimidation and reluctance and high way robbery (known in the *Shariah* as plunder and bloodshed) come under the powers of criminal courts. Two reasons may be assigned to this:

(a) The jurisdiction of dealing with what makes an act criminal is assigned to criminal courts.

(b) The punishment laid down by the *Shariah* for such a crime is execution, which exclusively falls within the jurisdiction of criminal courts.

When unmarried man and woman commit adultery, we must consider whether a misdemeanour court is empowered to deal with it. If so the case should be preferred in that court. But if it falls within the jurisdiction of the criminal court then the culprits should be tried in such a court, inasmuch as the raison deter of the jurisdiction of a criminal court is the incompetence of misdemeanour courts to pass specific sentences. Now the *Shariah* enjoins lashes as a punishment for adultery committed by an unmarried couple. It is therefore proper to include such a sentence in the powers of the misdemeanour courts as long as it is competent to do so.

But a case of adultery committed by married persons falls within the jurisdiction of criminal courts because the punishment laid down in the *Shariah* for such a crime is stoning to death i.e. to execute the offenders in a prescribed manner and the power of passing death sentence is vested in the criminal court to the exclusion of subordinate civil courts. Even if one of the two culprits is married, the power of deciding such a case would vest in the criminal court, for the act of adultery is not amenable to division. Hence the single act of both the adulterer and the adulteress requires that they should be tried in one and the same court because a summary court is not competent to award punishment to a married person found guilty of adultery. A summary court

is empowered to pass sentences for adultery committed by unmarried persons only, whereas a criminal court has the powers to award punishment of stoning to death as well as the lesser punishment of scrouging; for if it is empowered to pass severe punishment it is obviously competent to pass a lighter one, too.

(iii) *In Respect of General Application of Laws*

A significant result of implementing the doctrine of the invalidity of repugnant laws would be that only those criminal, civil, commercial and international laws will be allowed to operate which are in harmony with the injunctions of the *Shariah* provided that the *Shariah* contains specific relevant injunctions. In the absence of such specific injunctions, the laws must conform to the general principles of the *Shariah* and the spirit of law. Laws or provisions repugnant to the *Shariah* would be totally abandoned and replaced by the provisions of the *Shariah*. The application of such *Shariat* provisions would, however, be based on such juristic views as may accord with the relevant legal provisions.

The legitimacy of legal provisions does not presuppose their conformity to the position held by any one particular school of Islamic jurisprudence such as the *Hanafites*, Malikites etc. It is enough for the legitimacy of law to be in conformity with the standpoint of any of the various schools; for adoption of a law in agreement with the position of any schools would mean following that school of jurisprudence.

If a legal provision is partially in harmony and partially inconsistent with the *Shariah*, the part inconsistent would be void and replaced by an injunction of the *Shariah* which can be accommodated with the valid part of the legal provision. It is not necessary that this process of accommodation should conform to the position held by any one particular school of jurisprudence.

This is the basis on which discrepancies between legal provisions would be removed and they would consequently be harmonized. But the legislative bodies at the same time would be under the obligation to select such doctrines of the *Shariah* that are in tune with our social situation and completely modify the existing laws on the basis of those doctrines.

(iv) In respect of the application of *Shariah;* another result

of the invalidation of repugnant laws would be that courts will put into effect the *Shariat* injunctions straight away without any interference of the legislatures and the legislative, in their turn, will keep in view the principles of *Shariah* in passing acts, regulations and resolutions.

(196) Changes Resulting from the Introduction of the Doctrine Invalidity

Enforcement of the doctrine of invalidity will inevitably result in the renunciation of legal provisions repugnant to the *Shariah* and replacement thereof by the *Shariat* provisions. The enforcement of the *Shariat* provisions however, would not effect a metamorphosis of the existing legal frame-work, since most of the legal provisions are not different from the *Shariat* provisions. If certain provisions are at variance with the standpoint of some jurists, the same provisions are compatible with the views expressed by other jurists.

We now proceed to discuss the changes brought about in the punitive law by the introduction of the doctrine of invalidity.[1] Punitive law is linked, to a large extent, with the nature of crime and is different from the Islamic *Shariah* in respect of crimes entailing *huds, qisas diyat* and penal punishments.

(197) Crimes Involving *Hudood.*

According to the Islamic *Shariah* there are seven kinds of *Hudood* crimes:

(1) Adultery (2) Slander (3) Drinking (4) Larceny
(5) Bloodshed (6) Apostasy and (7) Rebellion.

The punishments prescribed by the *Shariah* for these crimes are termed as '*Hudood*. 'But to pass a *hud* sentence, it is necessary that the crime is committed in full and that there is nothing in the *Shariah* to inhibit the passing of such a sentence. If these two

1. We have confined ourselves to a discussion of changes effected in the punitive law by the introduction of the doctrine of invalidity, inasmuch as the subject of the present book is Crime and Punishment. Once acquainted with the basis of invalidity, we shall also be in a position to identify the invalid provisions of civil law and ascertain the extent to which they are void. A knowledge of the grounds of invalidity will also enable us to the extent of the effect of the law of promulgation. Thus being acquainted with the provision of law and that of Shariah we can assert that laws conforming to Shariah are valid and the other way about.

conditions are fulfilled, it will be essential to apply the prescribed *hud*. However, under certain circumstances, the *Shariah* disallows the hud sentence; for example when despite the full commission of a crime entailing *hud*, other conditions are not fulfilled, or the *hud* is invalidated by doubt or the criminal act is found to be at the initial stage. In all such cases the *Shariah* enjoins penal punishment. Awarding of penal punishment falls within the jurisdiction of the man in authority. Moreover, relevant sections of the law also comprise the prescribed punishments to be awarded by the competent authority. Under these circumstances, passing of sentences as provided for in the penal law is obligatory. In other words, penal law will cease to operate in the case of such crimes as are fully committed and fulfil all the prescribed conditions. This postulate applies to all the *hud* crimes with the exception of apostasy for which there is a separate provision.

Apostasy. The *Shariah* regards apostasy as a crime relating to public order and prescribes death sentence for such a crime. On the contrary, the existing penal law neither treats it as a crime nor lays down any punishment for it. Now, as every law repugnant to the *Shariah* is invalid, an apostate is to be punished according to the *Shariah* not-with-standing the Egyptian law which does not provide for any punishment for apostasy.

What has been stated above is theoretically testified. But in practice legal proceedings against an apostate can be stared and the prescribed sentences can be passed against him only when a case is filed against him in a court of law, that is, when the Public Prosecutor institutes a case with all the formalities. In other words, the *Shariat* provision pertaining to apostasy will remain suspended as long as Pubic Prosecutor desires. However, a case of apostasy may be preferred in the court Obversely. The *Shariah* does not regard the shedding of an apostate's blood as a crime and prescribes no punishment for the killer of an apostate, inasmuch as his murder is a lawful act. Now if somebody kills an apostate and legal proceeding is instituted against the killer, it will be the duty of the court to acquit him on the ground that he has killed an offender. Now it is incumbent upon every individual under the *Shariat* to kill an apostate. But this is imposed as an obligation and not as an essential duty so that if it is fulfilled by

one individual the obligation of all the other individuals is invalidated.

(198) Crimes Involving Qisas and Diyat

Under this category falls the following crimes with a separate provision for each

(i) Wilful murder (ii) Quasi-wilful Murder (iii) Murder by mistake (iv) Causing Injury wilfully and (v) Causing Injury by mistake.

(i) *Wilful Murder:* According to *Shariah* punishment for murder is *qisas*, irrespective of the fact whether or not murder is pre-meditated and conditions for the reduction of punishment exist. In case of wilful murder, the *Shariah* does not empower the court to reduce the prescribed punishment or to replace it with some other punishment; whereas the Egyptian law provides for death sentence for premeditated murder or killing by wilful poisoning. In all other cases of murder it provides for rigorous imprisonment for life or for a definite term. Moreover, It admits of reduction of punishment in all cases of murder and, if circumstances warrant, it allows even commutation of sentence. In view of the evident difference between the *Shariah* and the Egyptian law, the punishment of *qisas* in circumstances wherein the *Shariah* enjoins such a punishment and its commutation or replacement must be avoided.

The *Shariah* provides that the heir of the murdered person has the right to remit *qisas*, if he so desires, and if he does so then the prescribed punishment of *qisas* will be invalid. The heir also enjoys the right under the *Shariah* to pardon the killer without compensation or in lieu of *diyat*. If he agrees to remit *qisas* in lieu of compensation or *diyat*, the offender is bound to pay him *diyat*. It is the duty of the court to order the payment of *diyat*. However, Imam Malik holds that if the heir of a murdered person agrees to remit *qisas* in lieu of *diyat* or without it, the killer will be awarded penal punishment in either case[1]. On the contrary,

1. *Mawahib-ul-Jaleel* Vol.6, p. 268.

Imam Abu Hanifa,[1] Imam Shafi'ee[2] and Imam Ahmed[3] do not consider penal punishment necessary if the murderer is forgiven by the heir. But they have no grounds either for inhibiting penal punishment in the public interest.

But under the Egyptian law, pardoning of the killer by the heirs of the murdered person does not affect prescribed punishment, though pardoning by the heir is treated at the judicial level as the cause of reducing punishment or it makes possible for the court to commute the prescribed punishment as provided for in Clause No 17 of the Egyptian penal law. This Clause of the Egyptian law conforms to the stand-point of Imam Malik., who holds that in the event of remission of qisas by the heirs of the murdered person, penal punishment will be substituted for it. Hence in case of remission the offender will be ordered to pay *diyat* or sentenced to penal punishment. If he is pardoned without *diyat,* he will only be sentenced to penal servitude. Since punishments laid down in the Egyptian law are of penal nature, sentences passed in case of remission will, save death sentence only, he those provided for in the said law. As for the death sentence it actually consists of qisas which is invalidated by pardoning of the offender. Under such circumstances the court should consider reduction of sentence, keeping in view the causes thereof under clause No 17 of the penal law, inasmuch as in punitive cases the *Shariah* empowers the court in this respect.

In certain cases of even wilful murder, the *Shariah* does not enjoin qisas; for instance killing of the son by the father or death occurring in an accident. At any rate, the rule is that if the causes warranting retaliation under the *Shariah* do not exist, *diyat* will be substituted for *qisas* and the injunction relating to the remission of *qisas* will hold good also in the prohibition of *qisas.*

To sum up, whenever *qisas* is binding under the *Shariah,* legal provisions will cease to operate and when *qisas* is remitted or prohibited, the provisions of penal law will come into effect, whether *diyat* is to be paid or not. In such a *case,* however, the

1. *Badae'-wal-Sanae',* Vol. 7, P.246.
2. *Al Muhazzab,* Vol.2, p. 201.
3. *Al Mughni,* Vol.9, p. 467.

provision for death sentence in the penal law will be suspended. The Egyptian law was based on this principle before an amendment was made therein.

1. Beginnings of Murder.

Injunctions relating to the beginnings of murder vary with the effects thereof. If the effects appear to be such as warrant retaliation, then qisas would be binding. But if the effects do not seem to warrant *qisas,* then the punishment would be *diyat* or arsh. Imam Abu Hanifa, Shafi'ee and Ahmed are content with these penalties and do not regard penal punishment as binding. But in the public interest they do allow combination of penal punishments with *huds.* Imam Malik, on the contrary, considers penal punishment binding along with qisas and *diyat.* According to his view the Egyptian penal law is harmonized with the *Shariah* when the punishment of *qisas, diyat* or arsh is binding under the *Shariah,* for the jurists do not regard a combination of penal punishments with the punishments of *hud* as forbidden. People in authority, too, have prescribed certain punishments that have been mentioned in Egyptian law. Besides, the courts are empowered under both the *Shariah* and the penal law to reduce a punishment or award a more severe punishment, keeping in view the circumstances of the case.

However, such beginnings of an act of murder as do not produce any effect call for penal punishment and this accords with the Egyptian penal law which treats all punishments as penal.

2. Quasi - Wilful Murder.

The jurists differ on the question of quasi - wilful murder. Abu Hanifa, Shafi'ee and Ahmed distinguish a kind of killing as quasi wilful murder; whereas Imam Malik classifies murder into two categories only ! Wilful murder and murder by Mistake. He does not recognize any intermediate category such as quasi - wilful murder jurists recognizing quasi - wilful murder, however, hold that it is punishable only by *diyat.* But they allow combination of penal punishment with *diyat.* According to the position held by these jurists as to the quasi - wilful murder, legal provisions come into harmony with penal punishments even if the person in authority treats penal punishment as binding for such a crime.

If we apply the verdict of Imam Malik who allows combination of *qisas* and *diyat* with penal punishment for inflicting wounds, we shall be under the obligation to combine *diyat* and penal punishment in case of quasi - wilful murder for if one who inflicts as blown and one who inflicts wound can be awarded punishments of *qisas* or *diyat* along with a penal sentence, then the person who inflicts fatal wound (commits a quasi - wilful murder) is more liable to both penal punishment and *diyat* simultaneously. The fact that Imam Malik does not recognize any such category of *hud* crime as quasi - wilful murder, does not ban us from drawing this conclusion. In fact, we have arrived at this conclusion from the view-point of Imam Malik himself who combine *hud* and penal punishment for wounding. In short, according to the views of all the *Imams* the provisions of both the *Shariah* and the Egyptian law are simultaneously applicable to quasi - wilful murder. This does not prejudice the court's powers to reduce punishment under Clause No.17 of the Egyptian penal law or under the provisions of the *Shariah.*

(3) Murder By Mistake.

In case of murder by mistake the *Shariah* enjoins *diyat* on a smaller scale. In case of murder by mistake none of the jurists considers penal punishment along with *diyat* essential, as is the case with wilful murder, inasmuch as mistake is naturally different from intention. Nevertheless, all the jurists regard combination of *diyat* with penal punishment as admissible. On these grounds, the punishments laid down both by the *Shariah* and the penal law will be awarded if the authority considers penal punishment essential.

(4) Causing injury Wilfully.

In case of wilful wounding the *Shariah* enjoins *qisas* as for as this punishment is possible. Says Allah:

"And for wounds retaliation" (5:45)

Similarly the *Shariah* lays down retaliation for loss of limb as for as it is possible. If retaliation is not possible, *diyat* or *arsh* or any punishment deemed fit by the government is enjoined. Imam Malik is of the opinion that it is essential to pass a penal

sentence along with *diyat* or *qisas* so that the culprit might be reproved. Other Imams treat combination of *diyat qisas* and penal punishment as admissible but not essential. Thus according to the view held by Imam Malik, provisions of penal law will not cease to operate in case of wilful wounding but will rather be applied wholly or partially in combination with *qisas* or *diyat.* All the other Imams, too, allow combination of *diyat* and *qisas* with the punishments laid down in the penal law. Since the authority also declares penal punishment essential, none of the views is in conflict with the Egyptian penal law; nor the application of any view invalids the provisions of the said law.

(5) Causing injury by Mistake.

Inflicting wound by mistake is punishable by *diyat, arsh* or penalty imposed by the government. It is subject to an injunction similar to that pertaining to murder by mistake. That is the reason for which the provisions of the penal and *Shariah* must simultaneously be applied in such cases.

Blow that does not Produce Visible Effect:The *Shariah* enjoins penal punishment for a blow which does not produce any visible effect. Since the provisions of Egyptian law consist of penal provisions, they will not cease to operate in case of a blow mentioned above.

(199) Crimes Involving Penal Punishments.

As we have already pointed out, all the penal crimes have not been mentioned in the *Shariah;* nor have they been determined therein in the same way as crimes entailing *huds* or *diyat.* The *Shariah* contains provisions with regard to some penal crimes and leaves a large number of them to the discretion of the people in authority, who are allowed to prohibit certain acts and make certain others mandatory in the interest of common weal, public order and national integrity, provided that the prohibitions or obligations imposed there under does not come into conflict with the general principles and spirit of the *Shariah.*

The general principle of the *Shariah* wherein provision as to penal crime is contained lay down degrees of penal punishments ranging from the lightest to the most severe, empowering the

court to select one or more punishments from the collection determined by the *Shariah* keeping in view, however, the circumstances of the criminal act and of the offender.

This general principle of the *Shariah* applies to penal punishments for which the *Shariah* contains provisions, but not to those which it does not mention at all. As regards the latter, the people in authority have not been enjoined to adhere to the general principle, nor has it been made binding on them to determine any one punishment for penal crimes specified in the *Shariah* or make it mandatory for the courts to award such a punishment after the establishment of the crime. The authorities are not bound either to determine two punishments leaving it to the court to choose either of them. Similarly there is nothing in the *Shariah* inhibiting the people in authority to determine the lowest limit of punishment disallowing the court to exceed it. Matters to which penal law applies are those which the *Shariah* does not disallow.

Provisions of penal law and the regulations and decisions conforming thereto which determine crimes and punishments are framed by the people in authority. Hence the crimes for which the *Shariah* provisions exist would also be treated penal offences under the *Shariah* provided that they are consistent with the provisions of the *Shariah* or are not in conflict with the general principles and spirit of the *Shariah*.

It has to be taken into account that the makers of criminal laws in all the Islamic countries have paid no heed to the provisions of the *Shariah* in framing the laws in question. In fact they have deliberately ignored the *Shariah*. Our rulers have actually overstepped the prescribed limits. If this excess on their part does not invalidate their work in its entirety, the laws framed by them in contravention with the *Shariah* are certainly null and void.

As the result of the disregard of *Shariah* by the rulers and their failure in fulfilling their responsibilities with regard to the *Shariah*, we have three categories of penal crimes:—

(i) Crimes for which provisions exist in thc *Shariah* but for which no provisions have been made in the existing laws and regulations. Examples of such offences are eating of carrion,

blood and the flesh of swine, lending and borrowing on interest, nonpayment of *Zakat*, contravention of injunctions regarding waiting period after divorce and violation of the *Shariat* rules of worship such as saying aloud of prayers enjoined to be said quietly and the other way round and committing any excess in the prayer.

(ii) *Offences for which provisions exist both in the Shariah and the law in force.* This category of offences may be subdivided into two offences about which the *Shariat* provisions are not different from legal provision for example provisions pertaining to weights and measures, breach of trust and bribery etc. The other kind of offences falling under this category are those about which the *Shariat* provisions are at variance with legal provisions; for instance charging of interest, gambling and racing which the *Shariah* declares unlawful in all forms but the law treats compound interest, gambling and racing as culpable in specific forms.

(iii) Under the third category fall those penal crimes for which legal provisions exist, but for which there is no provision in the *Shariah*. These penal crimes are also of two kinds (a) Offences subject to such legal provisions as are in harmony with the general principles and spirit of the *Shariah;* for example, provisions pertaining to the observance of traffic rules. Such provisions also include acts prohibited in order to maintain public order; i.e. Violation of labour laws or acts declared unlawful in public interest as well as contravention of rules designed to prevent diseases and control natural calamities. Other crimes stem from the principles repugnant to the provisions and basic tenets of the *Shariah* and are incompatible with the spirit of interpretation. Examples of such offences is enforcement of rule regarding brothels. This rule is based on the concept of the legitimacy of prostitution and the consequent permission thereof by the government. It is designed to regulate adultery whereas adultery is totally forbidden by the *Shariah* in all circumstances. Such offences also include acts regulated by the law relating to brewing of wine and buying and selling thereof. Such laws too are based on the concept of the legitimacy of drinking and are actually designed to regulate this act whereas drinking according to the Shariah is absolutely and totally unlawful.

(200) Power of Rulers as to Prohibition and Punishment.

We have already pointed out that our rulers have totally ignored the *Shariah* in framing punitive laws and allied regulations. An example of the way the Islamic *Shariah* has been overlooked in Egypt is provided by the law pertaining to the judicial order wherein the legislature has laid down that "no act is an offence and entails a punishment unless there is a legal provision to this effect." This provision has been incorporated in the Egyptian Constitution as well.[1]

In addition, the offences and all the punishments involved therein together with the basic tenets relating to crimes and punishments have been codified and the code as a whole has been named "Penal Law". This penal law is binding in all circumstances. In this one or two punishments have been laid down for each crime. A maximum and minimum limit has been fixed for the prescribed punishment and the court is prohibited to exceed the two limits and hold in abeyance the execution of a sentence until the conditions are fulfilled. The aim of the Egyptian law is that punishment should be awarded for only those acts for which the law contains provisions and that the punishments should be restricted to the limits prescribed in the law. Besides, no punishments are to be awarded other than those provided for. Apart from the acts declared as illegitimate by the law all the acts are lawful notwithstanding any injunction of the *Shariah* explicitly declaring such acts unlawful and punishable. For instance.

1. The Egyptian Constitution contains the following article:"Unless legally provided for, no act is a crime involving punishment. The Egyptian law is evidently influenced by the western laws in this co text. The object of the Egyptian constitution makers in including this provision is identical with the framers of western legislators and that is why they have recognized only such crimes and punishment" as are included in the western laws. But the above provisions of the Egyptian law is in conflict with a fundamental clause thereof to the effect that Islam is the state religion of Egypt. Now the adoption of Islam by a country as its state religion means that it should treat the Islamic Shariah as its law and consider itself under the obligation of abiding by all the Shariat laws and regulations. If the first provision is construed on the pattern of western constitution it would amount to treating the second provision of the Egyptian constitution as null and void and to the rejection of Islam in final analysis. However, if the enforcement of the second provision is regarded as imperative by recognizing it as the fundamental tenet on the basis of which the entire edifice of the state stands, then we shall be obliged to constitute the first provision in a manner that the discrepancy between the two provisions is removed. Such an interpretation would lead us to reaffirm that the doctrine of essentiality of provisions is applicable to those offences for which provision exists both in the law and the Shariah.

Interest in any form and in any quantity is unlawful according to the *Shariah*,whereas the Egyptian law prohibits with certain qualifications and in specific form. Again, carrion blood and the flesh of swine is forbidden by the *Shariah*. But the Egyptian law neither prohibits things nor treats them as punishable. In short, the Egyptian legislature totally ignore the injunctions of the *Shariah* and does not provide for any measures to enforce them. It makes only such provisions effective as are included in the penal law and relevant regulations.

The Shariah has been subjected to the same treatment in other Muslim countries as well. Now the question arises how far can this attitude of the legislatures towards the *Shariah* and their action contravening the provisions of the *Shariah* be treated as justified or invalid? In order to find an answer to this question we have to review the rights and the scope of the rights of the rulers. Well then the rulers are vested with the following threefold powers with regard to the determination of crimes and punishments thereof:

(201) (a) Powers of Declaring Legitimacy and Illegitimacy of Acts and Awarding Punishments.

The ruler enjoys the right to declare certain acts lawful and certain others unlawful and to award punishments for the latter. He is also empowered to award one or more punishment for the same crime and determine the maximum and minimum limits thereof.

However, the ruler is under the obligation not to infringe the provisions of the *Shariah* and to see that the decisions taken are not at variance with the general principles of the Shariah and the spirit of its law and that imposition of an obligation or prohibition by him aims at safeguarding public interest or making amends for any loss or damage suffered by the public. With these limitations and reservations any action taken by the ruler within his jurisdiction is right. But his action will be treated as invalid in proportion as it exceeds these limitations. It can therefore, be said of the ruler that he does not have the power to declare any provisions of the *Shariah* meaningless or impracticable. If he does, his action will be treated as invalid. When an act declared

by the *Shariat* an offence is committed but which is not provided for as an offence in the penal law, the ruler is under the obligation to punish the offender in accordance with the *Shariah*, inasmuch as the consideration of the Shariat provisions by the ruler as impracticable does not revoke them; nor is the ruler authorized to revoke *Shariat* provisions. As for the offences provided for both in the *Shariah* and the penal law, the provisions of the *Shariat* will be preferred, whatever the legal provisions may be; for the legal provisions will be treated as void in proportion as they are inconsistent with the *Shariah*. However, in the case of crimes about which the legal and *Shariat* provisions are identical, legal provisions will be applied, not as legal provisions but as an injunction of the *Shariah*. As regards an offence about which legal provision exists but no injunction is provided for in the *Shariah* legal provision will be enforced provided that it is not inconsistent with the general principles of the *Shariah* and the spirit of the law thereof. But if the legal provisions are in conflict with the general principles of the *Shariah* and the spirit of the *Shariat* law, such a provision will be treated as null and void and will not be put into effect.

(202) (b) Powers to Allocate jurisdictions of Courts:

The ruler is empowered to delimit the jurisdiction of the courts authorizing some courts to deal with certain crimes and some others to take up the rest of the crimes. Similarly he may invest certain courts with the powers of

passing sentences and certain others of enforcing those sentences. However, in laying down the specific jurisdiction of the criminal courts, the ruler is under the obligation to abide by the injunctions of the *Shariah* and to abstain from violating the general principles of the *Shariah* and the spirit of the *Shariat* law. If he goes beyond these limitations, his orders will be invalid and as such will not be binding on courts. In such cases it will not be improper on the part of the courts to stop legal proceedings in pursuance of the ruler's invalid orders. The ruler has the power to confine the jurisdiction of some courts to dealing with cases of larceny and allocate the jurisdiction of dealing with cases of murder to some other courts. But the ruler is not competent to

prevent the courts from hearing cases of offences like eating carrion, drinking, apostasy and non-payment of the poor dues. He is empowered to assign the powers of dealing with cases of gambling and racing exclusively to a certain court but he cannot order a court to refrain from hearing the cases of these offences in pursuance of the provisions of the *Shariah*. Again, the ruler is competent to restrict the court to awarding certain penal punishments and to abstaining from awarding certain others; but he is powerless in restricting the court in the like manner so for as crimes entailing *huds*, *qisas* and *diyat* are concerned.

In the case of a crime for which provision exists in the *Shariah* but for which there is no legal provision and the punishment laid down in the *Shariah* for such a crime is, however, similar to legal punishments for other crimes the court will be deemed competent to deal with the crime in question. The silence of the ruler in this cases would be of no consequence inasmuch as both the crime and its punishment are provided for in the *Shariah*. The *Shariah* on no account, allows the ruler to hold in abeyance its provisions. If the ruler suspends any of its provisions, the court is enjoined not to carry out his orders. The court would rather be under the obligation to apply the provision of the *Shariah* and pass the sentence laid down therein provided that the court is competent to deal with such a crime and pass such a sentence

If a legal provision is at variance with the injunctions of the Shariah, it will be within the jurisdiction of the court to take up the criminal case involved. Here the cause of the competence of the court is the same as is in the case of offences overlooked by the law-makers, and the law consequently contains no provision for such a crime.

And in case of a crime provided for in the penal law but with no provision in the *Shariah*, the court will be competent to deal with it provided that its proceeding is not in conflict with the general principles of the *Shariah* and the spirit of the *Shariat* law. Should it infringe the general principles of the *Shariat* and the spirit of its law, the court will not be competent to carry on the proceeding, since the court is empowered to deal only with such matters as are consistent with the *Shariah;* or it may acquaint the offender on the ground that the provision of the law describing

the crime he is accused of as an unlawful act is void. It is the responsibility of the court under the *Shariah* to award punishment for every penal offence for which a provision exists in the *Shariah*. But in case if there is no legal provision, would the court award one of the punishments provided for in the penal law or would it choose one of the punishments determined by the *Shariah*?

The answer is that the punishment to be awarded would be the one laid down by the *Shariah*, the court is not authorized to award one of the punishments provided for in the penal law for a penal crime which is not provided for therein, since the legislator prescribes a punishment for each of the crime for which he makes a provision in the law and also lays down a limit for the punishment so that punishments may vary with offences. But the law does not provide for any general punishments to be awarded for crimes it does not include. It is, therefore, not possible to apply punitive provision to offences which the legislator has not considered at all and reckon such offences as crimes of legal nature. The punishments to be awarded for the offences in question will rather be those determined by the *Shariah*. If the court deems it fit to award more than one punishment in consideration of the circumstances of the offender and his offence it may do so. The reason for this is that the *Shariah* has, in principle, prescribed a collection of punishments ranging from the highest to the most severe ones and the court is vested with the powers to award any one or more of them as it deems proper in view of the circumstances of the case. It is not binding on the court to pass a definite sentence for each offence. It is empowered to pick any sentence out of the collection prescribed by the *Shariah*.

If the ruler imposes limitations on the powers of the court in respect of crimes for which he has made a provision himself or in respect of those for which provision exists in the *Shariah* besides his own, the limitations, so imposed will not hold good in the case of offences provided for in the *Shariah* but for which there is no legal provisions. In such a case the powers of the court will remain intact. It is essential that the court should enjoy a wide range of powers. Limitations laid down by the ruler will however, be valid in respect of and those definite crimes and punishments which he may have prescribed himself. In short, in

cases of crimes involving no restrictions, the powers of the court will remain unaffected and in the case of such offences for which the ruler makes a provision, the limitation imposed by him will be effective. Hence the court has the power to issue a warning to the offender, censure him or sentence him to flogging, banishment, death and life imprisonment. The summary court may award all the penal punishments in addition to death sentence and imprisonment for life. The intention of the ruler to keep the two last mentioned punishments within the jurisdiction of the court is manifest from the penal law.

As for the crimes for which legal provisions are at variance with the *Shariat* provisions, the former will be applied as far as they are consistent with the *Shariah* but where they are in conflict with it, the offence involved will be treated as if no penal provisions exist for it and such a sentence designed for penal crimes will be passed for it as is provided for in the *Shariah* but for which no legal provision exists. Example of such crimes are provided by the various forms of interest. The forms of interest for which there is no legal provision, the *Shariat* punishments will be awarded, as also for those about which the existing legal provisions are inconsistent with Shariah. As regards those forms for which legal and *Shariat* provisions are in harmony, legal sentences will be passed.

(203) Powers of Pardoning:

It is a recognized canon of the *Shariah* that in criminal cases the ruler has the power to grant pardon. He may pardon the offence as well as remit the punishment thereof wholly or partially. He is empowered to pardon the offender in case of a crime included in *Shariah* as well as one for which he makes a provision himself.

However, the power to pardon is vested with the ruler provided that it is not repugnant to the injunctions of the *Shariah*, general principles and the spirit of its law and that the power so vested is designed to promote public interest and to ward off an evil.

The power enjoyed by the ruler to pardon crimes or remit the punishment thereof presupposes the incidence of crime.

Evidently, he can pardon an offence only when it occurs and remit punishment only when it is awarded. In other words, no ruler can pardon a crime before it is committed or remit punishment before the sentence is passed. If he does, his action cannot be regarded as pardoning of a crime or remission of sentence. It will rather be treated as authorization of an unlawful act.

The ruler, doubtless, has the power to declare such acts lawful in the public interest as he may have originally prohibited. The reason for this is that the right to declare an act legitimate has been bestowed upon him by the *Shariah* under the condition that it is in the public interest to do so. Now conferring on a person the power of prohibition implies that he should also have the power to withdraw the prohibition whenever he is required to do so in the public interest. Thus when public interest calls for permission or prohibition of something, the ruler, empowered as he is to ban it, is competent to lift the ban as well.

But the acts already declared unlawful by the *Shariah* cannot be permitted by the ruler because he is not the prohibiting authority to allow them again. However, he has the power to remit punishment for acts declared unlawful by the *Shariah*. The *Shariah* clearly defines and declares totally unlawful such crimes as it treats invariably impermissible acts and lays down punishment for them as well. However, if the ruler considers pardoning preferable to punishment he has the right to pardon and the other way round. He is also competent to pardon such a crime and to partially remit the punishment thereof. Thus he will be within his rights to pardon a crime after it is committed and remit the sentence after it is passed. But pardoning of such a crime before it takes place is no pardoning. It rather amounts to the permission of the crime and no ruler has the power to allow what Allah has disallowed. If he does so, his action will be invalid and ineffective.

The reason for restraining the ruler from declaring lawful what is unlawful is that if such a power is conferred on him the provisions of the *Shariah* would in effect, become futile as the ruler would be in a position to hold in abeyance the injunctions of the *Shariah* in exercise of his powers of permission and prohibition whenever he chooses.

For the same reason it will not be correct to assert that the crimes included in the provisions of the *Shariah* but not provided for in the law, are permissible acts, inasmuch as the ruler has no power to allow an act forbidden by the *Shariah*. Similarly the same assertion will not hold good in respect of offences about which the legal provisions are at variance with the *Shariah* provisions, since the ruler is incompetent to permit criminal acts included in both the *Shariat* and legal provisions. He can, however, permit things which he may have disallowed himself and for which there is no inhibitory provision of the *Shariah*.

Having discussed the power of the ruler in respect of granting pardon, we are in a position to say that the ruler is free to disallow today and permit tomorrow the acts which he himself declares offences and prescribes punishment for them. He is competent also to award punishments for an act prohibited by himself or pardon such an act. There is no limitation whatsoever in exercise of this power except that it should be in the public interest. But the question of acts, forbidden by the *Shariah* and punishments laid down therein is different. An act declared unlawful by the Quran and *Sunnah* is invariably unlawful. Nobody can make it lawful and it is in fact binding on the ruler to enforce the prescribed punishments for crimes entailing *huds, qisas* and *diyat*. He can neither ignore nor remit it.

As regards punishments for crimes prescribed by the *Shariah*, they too are binding, but the *Shariah* confers on the ruler the right to remit them or pardon the crimes if public interest so requires; or Obversely, prescribe one or more punishments for each crime in the public interest. In short, the power of the ruler in respect of crimes and punishments mentioned in the *Shariah* is no more than to regulate the penal punishments, pardon penal crimes and remit punishments thereof.

The jurists discussing this problem have come to the unanimous conclusion that the ruler is under the obligation to enforce the *hud* punishments. If he fails in fulfilling his obligation, then it will be incumbent upon every individual of the *Ummah* to strive to put those punishments into effect, without considering himself guilty of any offence. If some individuals of the *Ummah*

succeed in their efforts to enforce the punishments in question, all the individuals will have discharged their responsibility. In other words, the jurists regard the establishment of *huds* as a duty imposed upon every one regardless of the ruler and the ruled. As long as the *huds* remain inoperative, nobody is relieved of his responsibility. Remission of the punishments in question or putting them off is forbidden.

Besides, the jurists are agreed that the provision in respect of punishments for offences involving *qisas* and *diyat* is similar to that enjoining *huds*. Unless the heir of the person against whom the offence is committed does not agree to forego the prescribed punishment, the execution thereof is obligatory. If the ruler ignores the punishment, then the aggrieved person himself will retaliate or, if murdered; his heir will retaliate, and this act of his will not be treated as an offence.[1]

Also the consensus of the jurists is that the ruler is not competent to allow an act which Allah has declared unlawful; nor is he authorized to permit an act prohibited by the *Shariah*, whatever the punishment prescribed for such an unlawful act. However the jurists differ on the question of enforcing penal punishments. Imam Malik, Imam Abu Hanifa and Imam Ahmed hold that the ruler is under the obligation to enforce penal punishments too and that he is disallowed to condone these punishments unless pardoning is preferable to punishment. Now if it is in the public interest to pardon the crime after it is committed and to remit the sentence after it is passed the ruler may grant pardon. The position taken by the above jurists is grounded in the notion that the penal offences have been declared unlawful in order to safe-guard public interest, or what comes to the same things in the final analysis, to defend Islam and it is for this reason that the punishments have been prescribed. Since the ruler is appointed by the *Ummah* as its representative for safe guarding public interest and maintenance of law and order, he is duty bound to enforce penal punishments, unless it is essential in the public interest for peace and tranquillity to pardon the offender

1. *Al Iqnaa,* Vol. 4, p. 244; *Al Umm.* Vol.6, p.171;
   Hashia Al bonani, Vol.8, p.118,
   Sharh Fath-ul-Qadder p. 160, 161, 112, 113.

and remit the punishment. The ruler will be relieved of his responsibility if pardoning is necessitated by public interest.[1]

On the other hand, Imam Shafi'ee is of the view that it is not binding on the person in authority to apply penal punishments although he is competent to do so. This view stems from the idea that the ruler is empowered to pardon the offence and remit the sentence as well as to award a punishment and not to award it and that an act which a man can do or can give up, though in his power, is not incumbent upon him to do.[2]

To accept the view of Imam Shafi'ee does not mean that provisions regarding penal punishments cease to hold good; for he does not say that the ruler has the power to invalidate the provisions of the *Shariah* or declare lawful what the *Shariah* forbids. All that he means is that the ruler is competent both to punish and pardon the offender. According to his view also an offence remains an offence and likewise, things forbidden by the *Shariah* are unlawful. However, the ruler is vested with the power of pardoning the offence or punishing the offender after the offence has been committed. This power of his is governed by the exigencies of collective interest and public order, which necessitates sometime the remission of sentence and often the execution thereof. The ruler cannot overstep the limitations of collective interest and public order, inasmuch as the very purpose of conferring on him the above power is to promote public interest and strengthen public order. He is appointed to look after the public affairs for this very purpose:

As a matter of fact, the position held by Imam Shafi'ee does not imply that the provisions of the *Shariah* should cease to be valid or punishments for penal offences should be suspended. The object of his standpoint is that the rulers should be held responsible for the results of the enforcement of penal punishments. If a person dies as the result of penal punishment or a part of his body is dismembered or incapacitated, it must be ensured that the aggrieved party is duly compensated. This conclusicn is drawn

1. (a) *Hashia al-banani wa Sharh-al-Zurqani* Vol. 8 PP. 115 and 116.
   (b) *Badae'-wal-Sanae',* Vol.7, p.63-64.
   (c) *Al Mughni,* Vol. 10 p. 348.
2. *Asna-al-Matalib* Vol.4, p.162-163.

from the position of Imam Shafi'ee on the ground that the jurists belonging to his school discuss his view under the head of compensation for the loss of offenders organs and not under the head of punishments. In other words they think that as the ruler is vested with the power of granting pardon or awarding punishment for penal crimes and as he is not under the obligation to essentially award punishment or award specific punishments, the ruler will be held responsible for compensating the aggrieved party in case the punishment awarded under his orders results in the death of the offender, incapacitation of any of his organs or dismemberment of any part of his body. This is because he could have awarded a punishment that may not have resulted in such a loss or he could not have awarded any punishment at all. But since he has applied a prescribed punishment leading, for instance, to death, he is responsible for the accident, the reason for this being his exercise of the power vested with him, whereas the exercise of power is subject to the condition of security.[1]

In short, the purpose of Imam Shafi'ee's view is to impose responsibility of the effects of punishments on the rulers rather than to suspend the provisions of *Shariah* or inhibit punishments in penal cases.[2] In view of the facts mentioned above, we can grasp the real meaning of Imam Shafi'ee's standpoint and it becomes comprehensible to us that by conferring the right of punishment on the ruler, the Imam does not mean that the ruler should suspend the punishment, unless such a course of action is necessitated by the public interest. The standpoint of Imam Shafi'ee is not, in effect, at variance with the position held by Imam Malik, Imam Abu Hanifa and Imam Ahmed which empowers the ruler to suspend punishment in the public interest, although awarding it is incumbent upon him. At any rate the two views are not out of tune with each other in so far as the practical results of punishments are concerned although they differ on the question whether from the view-point of jurisprudence the responsibility of the results of punishments rests on the ruler or not.

1. (a) *Al Umm* Vol.6, p 171.
   (b) *Asna-al-Matalib,* Vol.4 p.162.
2. *Asna-al-Matalib,* Vol.4, p.162.

Had the harder punishments been retrospectively effective, the above punishment would have been applicable to adultery committed before the prescription of the two punishments also. But no such case has come to light as flogging or stoning for the crime committed before the injunction regarding harder punishment was revealed. In other words the injunction enjoining punishment for adultery does not have retrospective effect.

Allah has declared marriage with father's wife unlawful, which had been a custom among the Arabs. But in doing so He has not provided for the retrospective applicability of the relevant injunction.

> "And marry not those women whom your father married, except what hath already happened (of that nature) in the past. Lo! It was ever lewdness and abomination and an evil way." (4:22)

This injunction was at any rate not applied to the known incidents of such marriage that had come about before the revelation thereof. But as the result of its promulgation matrimonial ties already existing were broken. In other words the above injunction is applicable with retrospective effect as a provision of evil nature, whose effect has been stretched in retrospect up to the time of marriage. But from the criminal view point it does not have any retrospective effect, for the people whose marriage had been dissolved were not awarded punishment. That is why Allah has decreed:"Except what has already happened in the past."

Similar is the case of matrimony with sisters, mothers and other tabooed women. Allah having enumerated those women with whom matrimony is unlawful, make it clear Himself:—

> "And it is forbidden unto you that you should have two sisters together except what hath already happened (of that nature) in the past. Lo ! Allah is ever Forgiving, ever Merciful." (4:23)

Subsequent to the revelation of this verse also matrimonial ties that had already existed were broken. Thus there is a civil aspect of this provision having retrospective effect. But as a provision of criminal law it does not have such effect since none of the men who had married a forbidden woman prior to the revelation of the above verse was awarded any punishment as

Allah Himself had excluded them:"Except what hath already happened in the past."

So also was the case when the Holy Quran declared having more than four wives unlawful, as the Arabs used to have. The following verse was revealed to this effect:—

> "Marry of the women, who seem good to you, two or three or four." (4:3)

This injunction dissolved union in excess of four wives, but laid down no punishment for the husband who had married more than four women. Hence it is effective retrospectively as a provision of civil law but not as a provision of criminal law.

Drinking and gambling were declared unlawful piecemeal; first the Muslims were commanded to keep away from the prayer in a state of intoxication:—

> "O ye who believe! Draw not near unto prayer when ye are drunken, till ye know that which ye utter. (4:43)

Then they were told that drinking and gambling do have some advantage but as sins they are of greater magnitude than whatever benefits accrue from them:

> "They question thee about strong drinks and games of chance. Say:In both is great sin, and some utility for men but the sin of them is greater than their usefulness. (2:219)

Again,

> "Strong drink and games of chance and idols and diving arrows are only an infancy of Satan's handiwork leave it aside." (V:90)

The Holy Prophet (S.A.W.) prescribed lashes for drinking and penal punishment for gambling but no case has come to light wherein punishment was awarded for the offences of drinking and gambling committed before the revelation of the verse cited above; and since we are not aware of retrospective application of such prohibitory provisions, it may be said that the injunctions forbidding drinking and gambling have no retrospective effect.

The Shariah Enjoins amputation of the thief's hand Says Allah:—

> *"As for the thief both male and female, cut off their hands. It is the reward of their own deeds as an exemplary punishment from Allah. (5:38)*

CHAPTER II

TIME FACTOR IN APPLICABILITY OF CRIMINAL INJUNCTIONS

(204) Basic Principles

A general principle of the *Shariah* is that its criminal provisions come into effect as soon as they are legislated and promulgated.[1] Accordingly they are not applicable to the time prior to their coming into existence and promulgation. In other words criminal provisions do not operate with retrospective effect and punishments for offences will be awarded on the basis of provisions existing at the time of their commission.

The question of retrospective applicability of criminal provisions has not been discussed independently on books on jurisprudence, but this does not mean that the *Shariah* is unfamiliar with it and has taken no notice thereof. In fact, we can derive a complete theory as to the retrospective effect of criminal provisions by an enquiry into the Quranic verses, injunctions and the causes of their revelation.

A study of the Quranic verses comprising criminal provisions reveals that criminal laws do not come into effect retrospectively. However, there are two exceptions to this rule:

(1) Criminal provisions are retrospectively applicable to dangerous offences threatening public peace and order.

(2) Criminal laws apply retrospectively, of necessity, to a case wherein their application in retrospect is in public interest.

The difference between the two exceptions is that the first admits of option for the legislator whereas the second is essential which the legislator cannot hold in abeyance unless it is in the public interest to do so.

1. See also Article 87.

We now proceed to discuss the grounds of the foregoing general principle and the exceptions thereto.

(205) General Principle—Criminal Laws Do not Have Retrospective Effect.

This fundamental principle has been derived from a consideration of the Quranic verses comprising criminal provisions and the causes of their revelation. All the injunctions declaring crimes unlawful were revealed after the propagation of Islam and the punishments were awarded under these injunctions for crimes committed before the revelation thereof with the exception of slander and murder. Punishments for the two last mentioned kinds of offences were, however, applicable to those committed prior to the revelation of relevant injunctions. It will not be possible to discuss all' the crimes and, therefore, we content ourselves with a consideration of a few offences.

Adultery was declared unlawful in the very beginning of Islam. Originally a lighter punishment was prescribed for it which consisted of chastisement and detention within the four walls of the house, as may be seen from the following divine decree

> "As for those of your women who are guilty of lewdness, call to witness four of you against them. And if they testify to the truth of the allegation then confine them to the houses until death takes them or until Allah appoints for them a way (through new legislation). And as for the two of you who are guilty thereof, punish them both. And if they repent and improve then let them be Lo! Allah is Relenting and Merciful." (4:15-16).

subsequently harder punishment was enjoined and flogging and stoning to death was prescribed for adultery:

> "The adulterer and the adulteress, scourge each one of them with a hundred stripes." (24:2)

And the Holy Prophet (S.A.W.) commands as follows:—

> "Take this commandment from me:Allah has laid a way for them. So the punishment for the unmarried couple is a hundred stripes combined with banishment for one year and punishment for married couple is a hundred stripes combined with stoning."

> messages and we never destroyed the town except when their people were iniquitous." (28:59)

From the arguments advanced above, it any be inferred that the Shariat laws, as a general rule, do not have retrospective effect and that Shariat provisions, all the tennets of Islamic law and history of the Shariat provisions bear clear and unquestionable testimony to the fact that the criminal laws are not applicable in retrospects.

(206) First Exception

Justification for Retrospective Extension of Provisions Relating to Offences Endangering Peace and Tranquillity.

Exception to the general principle of the Shariah that criminal laws are not extensible in retrospects is justified only in cases of dangerous offences prejudicial to public peace and order. Examples of such exceptional problems are slander, bloodshed and *zihar;* wherein punishment was awarded prior to the revelation of the relevant injunction.

Jurists however, differ on the question of the revelation of the Quranic verse regarding slander. Some of them are of the view that it was revealed before the incident of *Ifk* and the *hud* laid down therein was applied after the incident and the exculpation of Hazrat A'isha of the slanderers and they were accordingly punished. If we are to accept this view, the injunction relating to false accusation does not have retrospective effect as its application to any incident preceding the revelation thereof is not known.

There are others who believe that the verse in question was revealed at the time of the incident. This view is more tenable. If it is accepted the injunction regarding slander becomes extensible in retrospects; for the Holy Prophet applied the *hud* prescribed for false accusation to the slanderers and thus extended it to an incident preceding the revelation of the divine injunction.

An explanation to the retrospective extension of the provision in question is that there were significant indications of the incident about which the verse was revealed. A group of people scandalized an honourable and venered wife of the Holy Prophet (S.A.W.)

In this case also we know no incident of cutting off the thief hand for an offence committed before the revelation of the injunction. It will therefore, be said that provision relating to theft is not applicable in retrospect.

Interest had been lawful before but Allah prohibited it at a later stage and commanded:—

> "Allah has allowed trading and forbidden usury. To whomsoever then admonition has come from his Lord and he desists, he shall have what has already passed. And his affairs are in the hands of Allah. And whoever returns to it these are companions of the Fire! Therein they will abide."
>
> (2:275)

Again,

> "O you who believe keep your duty to Allah and relinquish what remains due from usury, if you are believers". "But if you do it not then be apprised of war from Allah and His Messenger; and if you repent then you shall have your capital, wrong not, and you shall not be wronged."
>
> (2:278-279)

This prohibitory commandment assumes the character of a criminal provision on the one hand and that of a civil provision on the other. Thus two kinds of injunctions may be distinguished in this provision forbidding usury:the one being criminal and the other civil. The criminal injunction enjoins punishment for money transaction taking place after the promulgation of the prohibitory provision and not for one that had already taken place. The civil provision on the other hand lays down that the creditor will get back only the principal amount. Thus as a criminal provision it has no retrospective effect but as a civil provision it does and the effect thereof extends to the time of the execution of agreement regarding such a transaction.

Allah forbids killing of wild game during pilgrimage and also lays down punishment for it. But at the same time He forgives previous acts of hunting indicating that this divine decree is not applicable retrospectively:—

> "O ye who believe, kill not wild game while you are on pilgrimage. And whosoever among you kills intentionally the compensation thereof is the like of what he killed from

and thus excruciated her causing thereby excruciation to the Prophet. (S.A.W.) It was a grave incident that occasioned great unrest in the Ummah and gave rise to a fratcidal situation. It has been narrated that when the incident became the subject of too much gossip the Holy Prophet appeared at the pulpit and addressed the people in the following words:

> "O Community of believers! Who can rid me of the man who has caused so much suffering to my family? By God! What I know of my wives is their goodness and chastity. I also know that the person they talk about is virtuous. Whenever, he came to my family, I was with him."

On hearing this S'ad bin Moaz Ansari rose and said "O Messenger of Allah! I will rid you of that man. If he is an Awsi we will behead him ourselves and if he belongs to the Khazraji tribes we will do the same to him also if you so command."

S'ad bin Ibada, a Khazraji, who was otherwise a good man could not withstand the remark made against his tribe. He retorted, "S'ad, by God! you cannot kill the man."

Another man belonging to the Khazraji tribe named Useed bin Huzair who was the son of paternal aunt of S'ad, rose up and reproached his cousin. He said, "We will positively kill that man. You are a hypocrite. That is why you are speaking in favour of hypocrites.." This exchange of hot words provoked the tribes of Awsi and Khazraji to such a degree that fighting was about to ensue between them. But the Prophet exhorted them to exercise restraint and his repeated appeals pacified them.[1]

In short it was an incident pregnant with grave consequences, Hence the revelation of the verse enjoining *hud* for false accusation. It was so serious an affair that the security of the entire Muslim community was threatened. For this reason the injunction was made effective in retrospect. It was designed to punish the people involved in the slander, relieve those affected thereby and put an end to the mischief caused by the scandal.

Difference of opinions also exists about the revelation of

1. (a) *Tafseer-al-Tabari* Vol.18, p.53
   (b) *Tafseer-al-Aalusi*, Vol.18, p. 79
   (c) *Tafseer-al-Shihab Ali Baidawi* Vol. 6, p.159.

In this case also we know no incident of cutting off the thief hand for an offence committed before the revelation of the injunction. It will therefore, be said that provision relating to theft is not applicable in retrospect.

Interest had been lawful before but Allah prohibited it at a later stage and commanded:—

> "Allah has allowed trading and forbidden usury. To whomsoever then admonition has come from his Lord and he desists, he shall have what has already passed. And his affairs are in the hands of Allah. And whoever returns to it these are companions of the Fire! Therein they will abide."
>
> (2:275)

Again,

> "O you who believe keep your duty to Allah and relinquish what remains due from usury, if you are believers". "But if you do it not then be apprised of war from Allah and His Messenger; and if you repent then you shall have your capital, wrong not, and you shall not be wronged."
>
> (2:278-279)

This prohibitory commandment assumes the character of a criminal provision on the one hand and that of a civil provision on the other. Thus two kinds of injunctions may be distinguished in this provision forbidding usury:the one being criminal and the other civil. The criminal injunction enjoins punishment for money transaction taking place after the promulgation of the prohibitory provision and not for one that had already taken place. The civil provision on the other hand lays down that the creditor will get back only the principal amount. Thus as a criminal provision it has no retrospective effect but as a civil provision it does and the effect thereof extends to the time of the execution of agreement regarding such a transaction.

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the cattle, as two just persons among you judge, as an offering to be brought to the Ka'bah, or expiation thereof is the feeding of the poor or equivalent of it in fasting, that he may taste the unwholesome result of his deed. Allah pardons what has happened in the past. And whoever return to it, Allah will punish him. And Allah is mighty, Lord of Retribution." (5:95)

It is manifest from the criminal injunctions cited above that they have no retrospective effect. Thus they lead us to the conclusion that as a general rule the criminal provisions of the Shariah are not applicable with retrospective effect.

The reader will note that in some of these injunctions retrospective effect has been desired by forgoing previous acts, while in others there is no reference to retrospective effect at all. But this is of no consequence for the verse, by which previous acts have been forgiven, in itself comprises a provision that lays down a general words principle applicable to all inhibitory injunctions. In other although this principle relates to certain prohibitory injunctions yet it is not confined to them exclusively. This interpretation is in harmony with another fundamental tennet of the Islamic law to the effect that "man is responsible only for an act which is possible for him, which is within his reach and also he has so much knowledge of the provision enjoining it that he is induced to comply with the relevant injunction."

It also accords with this basic tennet of the law that no judgement can be passed on the acts of sensible persons before the legislation of a provision."

Our interpretation is also consistent with the following general injunctions of the Shariah. Says Allah:—

"We never punish until we have sent a messenger." (17:15)

Again,

"And we destroy no township but it had its warners." (26:208)

Once again,

"And thy Lord never destroyed the towns until He had raised in their metropolis a messenger reciting them our

Islam, Zihar.[1] *was treated as divorce, i.e. a change of relationship which, if effected, would dissolve the matrimonial union. But in those days Zihar was no crime. One day it so happened that Aus bin Samit put his wife Khaula away by uttering the Zihar formula "You are to me like my mother's back." Khaula went to the Holy Prophet and complained of the wrong done to her. Hazrat A'isha was at the moment helping the Prophet (S.A.W.) wash his head.*

"O Messenger of Allah" complained the unhappy, woman. "I spent many long years of my life with my husband, dedicated to him the prime of my life and bore children to him. Now when I am old and my children are no longer with me, he has put me away by *Zihar."*

"You are unlawful for him," said the Prophet (S.A.W.). "I complain to Allah that I need him badly" she moaned "0 Messenger of Allah", she added "I spent with him many years of my life and opened my stomach for him only to be put away by him thus."

"You are unlawful for him; "reiterated the Prophet (S.A.W.).

As the Holy Prophet (S.A.W.) repeated these words Khaula lamented louder and louder "I complain to Allah that I need him."

As this colloquy was in progress the divine injunction regarding *zihar* began to be revealed. By this time Hazrat Aisha had proceeded to wash the other part of the Prophet's head. She signaled Khaula to be silent. Having received the divine decree, the Prophet (S.A.W.) asked Khaula to bring her husband. When Aus bin Samit presented himself, the Prophet (S.A.W.) recited the following verses:

"Allah indeed has heard the plea of her who pleads with thee about her husband and complains to Allah and Allah hears the contentions of both of you. Surely Allah is Hearing Seeing. 'Those of you who put away their wives by calling

1. Zihar means like of a woman with whom conjugal relation is lawful to a relative with whom such a relation is forbidden by virtue of the bonds of blood matrimony and sharing the milk of the common foster mother. In a simile like this the Arabs used the word *Zahar* (back) to me. An Arab used to say "My wife is to me like the back of my mother." Thus from Zahr the word 'Zahar' has been formed to denote the change effected in relationship by the use of simile in question.

them their mothers - They are not their mothers None are their mothers save those who gave them birth, and they utter indeed a hateful word and a tie. And surely Allah is Pardoning and Forgiving."

"And those who part away their wives by calling them their mothers, then go back on that which they said must free a captive before they touch one another. To this you are exhorted and Allah is aware of what you do." 'But he who has not the means should fast for two months successively before they touch one another, and he who is unable to do so should feed sixty needy ones. That is in order that you may have faith in Allah and His Messenger. And these are Allah's limits. And for the disbelievers is a painful chastisement."

In these verses Allah says that the word zihar which the Arab used for putting away their women was abominable and what is abominable is actually unknown (?) It is also described as a lie because they called their wives their mothers, although they could become neither their mothers nor such women as were forbidden for them, since forbidden women could on no account be lawful for a man who put away his wife by zihar. Thus Allah declared zihar an unlawful act and prescribed punishment for it. So *zihar* which had been regarded as a legitimate separation between husband and wife became a crime. Included in the list of unlawful acts, it ceased to be a lawful act.

Aus bin Samit himself was the first to whom the injunction about zihar was applied. The Prophet (S.A.W.) asked him, "Can you free a captive?" His reply was in the negative. The Prophet (S.A.W.) then said, "One who cannot free a slave should fast for two months successively. Can you do that?" Aus excused himself by saying that if he did not eat three times a day, he was afraid that he would not be able to see anything in the dark at night. "The Prophet then said to him, "One who cannot fast for two months successively, should feed sixty needy persons. Will you be able to do that?" Aus replied, "O Messenger of Allah, I cannot do that either unless, you help me". "The Prophet helped him and he fed sixty needy persons before re-establishing conjugal relation with his wife.

the verse relating to bloodshed. Majority of the scholars hold that it pertains to the people of 'Arnia. These people name to the Holy Prophet (S.A.W.) but the climate of Madina did not suit them and they fell sick. The Holy Prophet earmarked a few female camels foı them and advised them to drink their milk and urine. They did as they were told, but having recovered, killed the grazier and got away with the animals. The Prophet (S.A.W.) sent a party to chase them and bring them back. On this occasion the following divine injunction was revealed:

> "The only reward of those who make war upon Allah and His Messenger, strive after corruption in the land is that they be killed or crucified, or have their hands and feet on alternate sides cut off, or be expelled out of the land. Such will be their degradation in the world, and in the Hereafter theirs will be an awful doom." (5:33)

Some scholars are of the opinion that the revelation of the above verse was occasioned by the offence committed by group of the people of the Book who had entered into covenant with the Holy Prophet; but they later broke the cavenant, resorted to robbery and caused disorder in the land. Ibn Jareer, however, narrates that the verse was intended for expressing disapproval of the Prophet's action against the people of Arnia who were left bleeding with their hands cut off and deprived of eye sight by passing needles into their eyes, just as they had done to the grazier. According to him the verse was revealed to forbid identical requital.[1]

If we accept the tradition related by Ibn-e-Jareer and concede that the verse was revealed after the punishment of the people of Arnia, we must also admit that the punishment meted out to them was in pursuance of the following divine injunction:

"The requital of an ill deed is an ill like it." (42:40)

Again,

"And one who attacketh you attack him in like manner as he attacked you." (2:194)

1 (a) *Tafa'er-al-Tabari;* Vol.6, p.119
(b) *Tafseer-al-Manar,* Vol.6, p.803
(c) *Tafseer-al-Quriabi* Vol.6, p. 148.

The verse under discussion was revealed with a new injunction regarding the punishment for a particular offence. If Ibn Jareer's statement is acknowledged as true, it will lead us to the conclusion that the injunction had no retrospective effect for it was not revealed for application to a preceding incident. But if it is admitted that the verse relates to the punishment of the people of Arnia or disbelievers, it would mean that the verse is enjoining punishment for an act preceding its revelation. It would, therefore, have retrospective effect. Majority of scholars believe that it was intended for the punishment of the people of Arnia. Thus it was effective retrospectively.

No doubt, public interest also requires its extension in retrospect, because the incident pertaining to the Arnians was a matter of grave nature. Had they not been punished severely, the Muslims would have been exposed to more aggression jeopardizing their peace and tranquility and the opponents of Islam would have been tempted to commit robberies with impunity, posing thereby a serious threat to public order. For this reason retrospective extension of the injunction contained in the verse was indispensable just as the retrospective application of the injunction pertaining to false accusation was indispensable for silencing the gossiping tongues and putting an end to the mischief caused by the false accusation of adultery and pacifying the people's excitement. To sum up, the retrospective extension of a provision of criminal law aims at safeguarding public interest and ensuring peace and tranquillity.

If there is a difference of opinion with regard to the revelation of the Quranic verses pertaining to the false accusation of adultery and bloodshed, there are no two opinions about the occasion of the revelation of the verse relating to *"Zihar"*. Thus the former verses may give rise to doubt if the Shariah allows retrospective extension of criminal laws, but the cause of the revelation of the *Zihar* verse is indubitable. The scholars are all agreed that it applies to a preceding incident. This consensus endorses the view of those who believe that the slander and bloodshed verses apply to preceding incidents and, therefore, have retrospective effect.

During the times of ignorance and the earliest period of

Islam established complete equality between the high and the low, the freeman and the slave, man and woman. The divine decree to this effect is as follows:

"O ye who believe! Retaliation is prescribed for you in the matter of the murdered; the freeman for the freeman and the slave for the slave and female for the female. And for him who is forgiven somewhat by his (injured) brother, prosecution according to usage and payment to him in a good manner. This is an alleviation and a mercy from your Lord. He who exceeds this limit will have a painful doom," (2:178)

A number of conclusions may be drawn from the principle of the Shariah enjoining application of that provision to the accused which benefits him:

(a) If a new provision benefiting the offender is promulgated before the sentence is passed, this new provision will be brought to bear upon him regardless of the fact that the crime is committed before the promulgation thereof.

(b) If a judgment is passed against the offender under a provision and subsequently an amendment is made therein, punishment will be awarded in proportion to that prescribed by the amendment.

(c) If a law is promulgated after the sentence has already been passed, declaring the offence a legitimate act entailing no punishment, then it would be essential not to put into effect the sentence passed under the previous law and if already commenced should be stopped forthwith.

(d) If the punishment laid down in the new law is more severe, than it will not be resorted to, because it is not in the interest of the accused. Moreover, in criminal cases punishment as a general rule is awarded according to the provisions in force at the time of the commission of the offence.

(208) Comparison of Shariah with Man Made Law

We have discussed in the previous pages the principles of the Shariah relating to the temporal application of provisions and these are also the principles adopted by the Modern Law. They have, however, been incorporated in this law much later, inasmuch as in all such laws the legislator had full powers to give retrospective

effect to any criminal provision. But the French Revolution put an end to this unqualified power and the legislator as a rule was disallowed to promulgate any provision with retrospective effect This rule had been valid till the end of the nineteenth and the beginning of the twentieth century when the legislators raised a voice against it. They realized that though the restriction on providing for retrospective extension of criminal law was necessary in the interest of the individual, it was detrimental to the interest of the society as a whole. They pleaded for preference of collective interest to the interest of the individual and for conferring on the legislator the power to provide for retrospective applicability of criminal laws if collective interest so required. The Italian legal experts are of the view that in matters that have already been of criminal nature retrospective effect should be provided for in laws prescribing severe punishment, inasmuch as the right of the society is of greater importance than individual interest. The Britishers also regard retrospective extensibility of severe punishments as cogent. The Egyptian and the French laws contain provisions for retrospective extensibility in cases of habitual and doubtful offences.[1]

But the legal experts do not advocate the conferment of unqualified power on the legislator of giving retrospective effect to criminal laws. They can exercise, this power only when the public interest so requires and this exactly is the Islamic standpoint.

After the cessation of global hostilities in 1945, the victorious countries tried the leaders and officials of the vanquished nations and sentenced them to death rigorous or life imprisonment. The acts for which such sentences were passed did not constitute offences either under the laws of the victorious as well as the vanquished peoples or under the international law; nor had any such sentences passed ever before. These historic sentences were example of unprecedented extension of laws in retrospects on a mass scale.

The principle calling for the application of law to the previous crimes of the accused so as to benefit him has been recognized in all the laws, but it was formally accepted in the last century.

1. (a) *Ali Badwi, Al Qanoon-ul-Janai* p. 116-117
   (b) *Al Mausula-tul-Janai* Vol.5, p.568.

To sum up, punishment for *zihar* was applied to an incident which had taken place before the revelation of the divine injunction. In other words, the injunction relating to *zihar* had retrospective effect.

(207) Second Exception

If the Law Benefits the Accused, Retrospective Extension Thereof would be Imperative.

If a provision of criminal law benefiting the accused is promulgated, no provision other than this would be applicable to him, regardless of the fact that another provision calling for a severe punishment may apply to him. But the application of the new provision is subject to the condition that no final, judgement has already been passed under an old provision. If a final verdict has already been given, then the case is settled once for all and no fresh proceedings can be instituted under the newly promulgated provision.

The basis of applying a criminal provision to the offender is that punishment prevents him from committing the offence again on the one hand, and safeguarding the society against the harm resulting therefrom on the other. Punishment therefore, is a collective need arising out of the demands of public interest. Every need as a rule is judged by this criterion of necessity. As collective interest requires reduction of sentence, it is essential that the accused is allowed to benefit from the new provision enjoining lesser punishment, provided that sentence has not already been passed against him. That is because severe punishment does not safeguard public interest. Justice also demands that punishment should not exceed collective necessity since the very purpose of punishment is to ensure collective security. Besides, causes invariably conform to effects, whether positive or negative.

The subject under discussion may best be illustrated fly the crime of murder. In the pre-Islamic period the Arabs discriminated between man and man on the basis of prominence and social status. When a murder was committed wilfully or by mistake they took into account the position and status of the person killed. As a result of discrimination *diyat* varied with the social position of the murdered. Thus compensation for the life

of a prominent and high ranking person was many times greater than for that of an ordinary man. This discrimination assumed such a great proportion that heads of a whole tribe were demanded in retaliation for the lives of a few individuals. For instance, *diyat* for the life of one belonging to Banoo Nuzair tribe was twice as much as one belonging to Banoo Quraiza. If a bigwig among the Arabs was killed, not only was the murderer beheaded, but such dignitaries of his tribe were also slain whom his heirs regarded as the price of his life. Often they demanded a large number of heads as *diyat*. For instance a man belonging to the Ghani tribe killed Shas bin Zuhair. Shah's father Zuhair bin Jazeema, accompained by the people of his tribe made for the settlements of the killers tribe. The people of that tribe asked him what his demand was. Zuhair replied, "I want no more than three things either revive my son Shas or fill my turban with all the stars of the heaven or surrender to me your entire tribe in order that I may massacre whole of it." "Mind you" he added even then I would feel that I have not been adequately compensated." Note that the heir of the person killed says here that he would not be satisfied by reducing the entire tribe to naught. It so happened that Zuhair bin Jazeema himself killed Kaleeb bin Wail and consequently war broke out between the two tribes, which continued for a long time. But Zuhair did not take part in it. However, his own son Bajeer fell in the hands of the hostile tribe. At this stage he approached that tribe and said, "You are aware that I have been holding aloof from the war. Come now, slay Bajeer to recompense the murder of Kaleeb and stop fighting." But they replied, that Bajeer was not worth the shoe-lace of Kaleeb. On hearing this Zuhair joined the battle. Zuhair was one of the dignitaries of his tribe.

Before the advent of Islam the Arabs had claims of heads and wounds against one another. Islam weeded out this barbaric custom and established equality between man and man. Says Allah:

"Is it a judgment of the time of pagan ignorance that they are seeking. Who is better than Allah for judgment to a people who have certainty in their belief?"

1. *Al Umm*, Vol. 6, p.7 *Tafseer-ul-Qurtabi*, Vol. 2 p.44.

After this compression we are in a position to say that the modern laws denied the principle of retrospective extensibility of criminal provisions from the Islamic Shariah and the doctrines regarded as modern and new concepts actually represent a sophisticated application of the Islamic principle as provided for in the Shariah fourteen hundred years ago.

SPATIAL EXTENSION OF CRIMINAL LAW

(209) Is Islamic Shariah International or Territorial?

The Islamic Shariah is a universal law meant for the entire mankind. It is not territorial, being confined only to a particular part of the globe. It comprehends all the peoples of the world, irrespective of race and colour and of territorial and national limits. It addresses both Muslim and non-Muslim peoples living in the Islamic and non-Islamic states. Since all the peoples in the world do not believe in the Shariah and it is not possible to impose it on all of them it will be enforced only in countries where the Muslims are in power. In other words, the enforcement of Shariah presupposes the authority of the Muslims. Obviously, with the expansion of the territories under the Muslim rule the enforcement of the Shariah will cover wider areas and vice verse. In other words, the Islamic Shariat has become a territorial law under the pressure of necessity and circumstances. But in reality it is a universal law. Thus it may be said that the Shariah is fundamentally a universal law, but practically it is territorial with its operation confined to certain parts of the world.

(210) Division of the World.

The chasm yawning between theory and practice has led the jurists to divide the world into two parts:(1) Darul Islam consisting of all the Islamic states and (2) Darul Harb, consisting of all the non-Islamic states. In the first part of the world enforcement of the Shariah is obligatory, while in the second it is not, as the enforcement of the Shariah is not possible therein.

(211) Darul Islam.

Darul Islam comprises all those countries where Islam is openly Practiced[1] or whose Muslim population can live up to Islam above board.[2] It includes every country whose entire population or a majority thereof is Muslim, or which is under the

1. *Bada'e-wa1-Sanae'*, Vol.7, p.130,
2. *Asna-al-Matalib*, Vol.4, p.204.

Muslim rule, although majority of its population consists of non-Muslim. It also includes a country under the non-Muslim rule whose Muslim citizens openly live in accordance with the injunctions of Islam or where there is nothing impeding the Muslims to practice their faith.

The citizens of Darul Islam are subdivided into two classes

(1) The Muslim believing in the Islamic faith and the

(2) Zimmis i.e. All the non-Muslim who abide by the Islamic law and are permanent citizens of Darul Islam regardless of their religions. This class of citizens includes Christians, Jews, Zoarastrians and sabians as well as the atheists and all those who love goodness.

The security of life and property of all the citizens of Darul Islam is guaranteed, whether they are Muslims or Zimmis. The Shariah guarantees security of its citizens on the basis of two things[1] (a) Faith and (b) Guarantee of Security. Faith means Islam and guarantee of security means implementation of an agreement or truce etc., under which protection and peace is ensured.

A person who enters into the fold of Islam is guaranteed the security of life and property, as the Prophet has said:

"I have been commanded to fight with the people until they profess that there is no god worthy of worship other than Allah and Muhammad is His Messenger. When they acknowledge this, their life and property are safe from me unless they become due as a right."

If a man comes under the protection of Muslims according to an agreement the security of his life and property, too, is ensured, whether he embraces Islam or not. In short, the life and property of both the Muslim and the Zimmi citizens of Darul Islam are secure. The security of Muslims is guaranteed because of Islam and that of Zimmis because of the umbrella extended to them under the agreement.[2]

1. The word used in the context is 'Ismat' meaning security. Here it means life and property are secure and nobody can encroach upon them.
2. (a) *Badae'-wal-Sanae'* Vol.7, p.102
   (b) *Mawahib-ul-Jaleel*, Vol.6 p. 231
   (c) *Asna-al-Matalib*, Vol.4, p.218
   (d) *Al Sharh-ul-Kabeer*, Vol. 10, p. 630.

The Shariah provides for two kinds of protection:

(a) Provisional and (b) Permanent.

Provisional protection is extended only for a fixed period; for instance, protection guaranteed under a temporary peace treaty or under permission to enter Darul Islam. Permanent protection is granted for indefinite period and this is guaranteed only under a pledge. Such protection is enjoyed only by the Zimmies permanently residing in Darul Islam. They have to abide by the injunctions of Islam in lieu of the protection guaranteed to them.[1]

(212) Darul Harb.

Darul Harb comprises non-Islamic countries where the Muslims are powerless or where the injunctions of Islam are not enforced under declared policy, whether or not such countries are ruled by a single sovereign state or a number of them and the permanent citizens thereof are Muslims or non-Muslims, and should they be Muslims, are not in a position to follow the injunctions of Islam.

There are two classes of the citizens of Darul Harb

(a) The Harbies and (b) The Muslims

Harbies are those citizens of Darul Harb who do not believe in Islam and who are not guaranteed protection by Islam and in the absence of any agreement between them and Darul Islam, the life and property of the Harbies are lawful for the Muslims. That is because, as has already been mentioned, protection can be guaranteed by Islam only in the case of either profession of Islam or agreed guarantee of protection.

Such Harbies as have no agreement with Darul Islam are

1. (a) *Badae'-wal-Sanae'*, Vol.7, p.106
   (b) *Asna-al-Matalib*, Vol.4, p.210.
   (c) *Mawahib-ul-Jaleel*, Vol.3, p.360
   (d) *Al Mughni*, Vol.10, p.578.

   A Zimmi is not under the obligation to abide by all the injunctions of Islam. He will follow only such Islamic injunctions as are not inconsistent with his religious beliefs. In lieu of his abiding by those injunctions the security of his life and property will be guaranteed. Hud prescribed by Islam will be applied to *Zimmi's* for acts regarded by them as illegitimate, as for example larceny. These *huds* will not be applicable to acts regarded by them as legitimate; for instance use of liquor.

Al Sharhul Kabeer, Vol. 10 p. 611

Badae'-wal-Sanae', Vol.7, p. 252.

not authorized to enter it and if any one of them does unauthorizedly enter, his life and property will be lawful for the Muslims. He may be killed and his property may be seized. It is also permissible to imprison or pardon such a transgressor. And if a Harbi comes into Darul-Islam with due permission of the authorities thereof or under special protection or agreement, he will be immune and his life and property will be temporarily secure, since the protection granted to him will be provisional. He will be authorized to stay in Darul Islam for the period of protection granted. No sooner that period expires than he will be come a Harbi again in the same way as his life and property would have been unsafe if he had left Darul Islam. If he stays on in Darul Islam intentionally, his position according to some scholars will be that of a Harbi and according to others that of a Zimmi. The latter argue that as he would be living in Darul Islam of his own accord his life and property would be permanently secure

As for a Muslim living in Darul Harb, Imam Malik, Imam Shafi'ee and Imam Ahmed hold that he is just like a Muslim of Darul Islam, entitled to the security of life and property in spite of the fact that he stays in Darul Harb for a long time and that if he wishes to come to Darul Islam, he will not be stopped. Imam Abu Hanifa, on the other hand is of the view that a Muslim who lives on in Darul Harb and does not migrate to Darul Islam cannot be treated as secure by virtue of his Islam, inasmuch as the Muslims owe their security to their entity as Muslims and to their power and prestige and as the Muslim living in Darul Harb has no prestige or power, enjoys no security. However, according to Imam Abu Hanifa, he may come to Darul Islam whenever he likes and as soon as he enters the territorial limits of Darul Islam he will be entitled to protection.[1]

The killing of a Muslim or Zimmi entering Darul Harb without permission will be lawful for the people thereof, just as the killing of a Harbi entering Darul Islam unauthorizedly will be lawful for the citizens of Darul Islam. However, if a Muslim or Zimmi enters Darul Harb with permission or under the pledge of security he will be treated as a protected person. But his stay

1. *Badae'-wal-Sanae'*, Vol.7, p.25.

there will be temporary and he may return to Darul Islam whenever he likes. If a Muslim settles down in Darul Harb permanently his position will remain unchanged as long as he is a Muslim. But if he renounces Islam, he will become a Harbi. Similarly, a Zimmi who stays on in Darul Islam for good will be treated as Zimmi.

A protected Harbi woman married by a Muslim or Zimmi will assume the position of a Zimmi by virtue of such matrimonial union. But, on the contrary, if a protected Harbi marries a Zimmi woman she will not become a Harbi and according to the cogent opinion held by some scholars a protected Harbi marrying a Zimmi woman is not to be treated as a Zimmi. However, if a protected man marrying a protected women acquires the rights of a Zimmi, his wife also will acquire the same rights.

(213) Territorial Character of Islamic Shariah.

We have stated that the Shariah is essentially universal. In practice, however, the situation demands that it should be of territorial character, since it is practicable only in Darul Islam. Now the question arises as to what extent it can be treated as territorial. Will it apply to all the people living in Islamic countries or will it apply to some of them to the exclusion of others? If it is applicable to crimes committed in Darul Islam, can it be extended to the crimes which the people of Darul Islam may have committed in Darul Harb?

The Shariah extends to all the people living in Darul Islam, irrespective of plurality of governments and diversity of political systems or of its being a single state like the one under the Omayyads and the Abbasids or consisting of numerous states like those of the world today. The Shariah applies to everyone living in such a state or states whether he or she settles down before the advent of Islamic rule or thereafter or whether he or she lives in plains and valleys or hills and deserts, regardless of his or her creed, language or race. In short, it is incumbent on everyone belonging to Darul Islam to abide by the injunctions of Islam. In other words the Shariah, as a general rule, extends to the offences committed in Darul Islam, whoever the offender may be, as well as to any offence committed by a citizen of Darul Islam while in Darul Harb. This general principle is based

both on the spirit of the Shariah and the prevalent situation. On the one hand it is a universal law that must be applied to every crime committed anywhere in the world, while on the other hand, circumstances demand that it should be applied only to the people living in Islamic countries. Hence the Shariah contents itself with its applicability to the crimes committed in Darul Islam including those committed by an offender who does not belong to Darul Islam. Since the operation of Shariah is possible only within the territorial limits of Darul Islam and the sphere of its operation covers all the individuals present therein, it extends itself to the crimes of the people of Darul Islam committed in Darul Harb as well, that is, because it can be applied in Darul Islam, although it cannot possibly be applied in Darul Harb.

This is a general principle of the Shariah, on which there is no difference of opinion. However, the jurists differ on the question of the application of the principle. As a result of the divergence of opinions three different views have emerged as to the enforcement of criminal law.

(214) The First View.

(1) The first of the Three views is held by Imam Abu Hanifa. According to him the Shariah will be brought to bear on crimes committed in Darul Islam, that is, on crimes committed any where in an Islamic state, whether the offender is a Muslim or a Zimmi, as there is no law for the Muslim other than Shariah, nor is he allowed to submit to any other law. So far as the Zimmi is concerned, he is bound to abide by Islamic injunctions under the pledge of security.

As for an alien person who comes to stay for the time being in Darul Islam, he will not be subject to the Islamic injunctions in respect of any offence prejudicial to the rights of Allah (i.e. Collective rights); but if he is guilty of an offence prejudicial to an individual right, he will be awarded punishment under the Shariah. One who stays in Darul Islam for a short period, as we know, is a protected person.

Imam Abu Hanifa's explanation to pardoning a protected person is that such a person does not come to Darul Isiam with the intention of permanent settlement. The purpose of his visit is

simply to fulfil occasional requirements such as to do business, deliver a message or to sojourn enroute to some other land. If a person succeeds in securing protection, it does not mean that he is under the obligation to abide by the Islamic injunctions in all matters and in all cases of crimes. He will rather abide by the Islamic injunctions to such an extent as accords with the purpose of his visit and matters pertaining to this purpose relate to the rights of that people. Hence he will simply fulfil the demands of justice and take care that nothing he does troubles or harms anybody, since, we, the citizens of Darul Islam, undertake to protect him and guard him against harm. Now, as the offences entailing retaliation and the offence of false accusation of adultery are closely linked with the right of the people, a protected person committing such an offence will be duly punished. In fact he will be liable to punishment for all the offences he commits to the prejudice of individual rights; for instance usurping somebody's property or causing him material loss. For all the other offences a protected person is neither accountable nor liable to punishment, whether the punishment involved constitutes the right of Allah or the right of Allah predominates in it,[1] such as adultery or larceny.

Offences committed by a Muslim or a Zimmi outside Darul Islam are not subject to the application of Shariah, irrespective of the fact that the offender returns to Darul Islam after staying in Darul Harb or that the offender originally a Harbi, comes and settles down in Darul Islam, for the problem according to Imam Abu Hanifa is not that a Muslim or a Zimmi conducts himself in accordance with the Islamic injunctions during his stay at any place, but the real problem is the obligation of the Imam or the person in authority in respect of applying a hud laid down by the Shariah. He can fulfil his obligation only when it is in his power to do so; inasmuch as obligation is qualified by the power to fulfil it. As the Imam does not have any power in respect of crime when it is committed in Darul Harb, he is not under the obligation to award punishment for it.[2] This means that place of offence at the time of commission thereof must be within the

1. *Sharh Fath-ul-Qadeer,* Vol. IV, pp.155-156.
2. *Sharh Fathaul Qadeer,* Vol.4, p. 152-153

jurisdiction of the Islamic state and in the above case the Islamic state does not have any authority over the place where the offence is committed. It may be inferred from this that the place where the offence is committed is annexed to the Islamic state at a later stage, the offence does not become punishable, inasmuch as at the time of the commission of crime it was not within the jurisdiction of the Islamic government.

If a Muslim escapes into Darul Harb after committing a criminal act, the punishment he will be liable to, will not be nullified since the act he is guilty of is culpable. Similarly, if a protected person returns to Darul Harb after committing an offence, the punishment to which he is liable will remain valid.[1]

If Muslim army is stationed inside Darul Harb the offences committed within the limits of the station or camp will be treated as those committed in Darul Islam. The reason for this is that the area where the Muslim army is stationed, is under the control of that army and thus the Islamic state will have authority over it. Hence the military station will be regarded as a part of Darul Islam and the offences committed beyond the perimeter of the station will be treated as those committed in Darul Harb.[2]

Imam Abu Hanifa maintains that the punishments of offence committed by the Muslim troops during the war will be awarded on their return to Darul Islam since the Prophet has enjoined that "No hands are to be cut off during the war.[3]

Imam Abu Hanifa differentiates between murders committed under different circumstances. According to him if a Muslim or a Zimmi belonging to Darul Islam kills a Muslim of Darul Harb, who does not migrate to Darul Islam after embracing Islam but lives on in Darul Harb, the murderer will not be subject to retaliation or payment of *diyat.* If a Muslim or a Zimmi citizen of Darul Islam moves to Darul Harb where he stays as a protected person and is killed during his stay, the killer will not be subjected to retaliation or *qisas.* The reason for this is that the place where the crime is committed is beyond the jurisdiction of the government

1. *Badae'-wal-Sanae'* Vol.7, p. 133.
2. *Sharh-e-Fathaul Qadeer,* Vol.4, p. 154
3. *Badae'-wal-Sanae',* Vol.7, p.132.

of Darul Islam. However, the killer will have to pay *diyat* for the murder. Again, in case if a person is taken to *Darul Harb* by force, say, brought as a captive and killed there, no *qisas* or *diyat*, according to Imam Abu Hanifa, will be obligatory in lieu of his murder; for guarantee of security comes to an end with captivity. On the contrary Imam Abu Yousuf and Imam Muhammad are of the view that guarantee of security to a person does not lapse when he is taken a captive. According to them both the killer and the person killed in this case belong to Darul Islam and if it is not possible to get *qisas* enforced at the place of murder on account of its being beyond the jurisdiction of Islamic government, the killer will at any rate be under the obligation to pay *diyat* as penalty for murder because the right to penalty becomes obligatory for both the claimants at the time of preferring the claim.[1]

Imam Abu Hanifa regards money transactions involving usury by a Muslim or Zimmi living under pledge of protection in Darul Harb with a Harbi or a Muslim of Darul Harb who has not migrated to Darul Islam after embracing Islam as permissible. He argues that usury does away the property of a Harbi with his consent and this is not something inconsistent with the guarantee of protection; and as for the property of a Muslim of Darul Harb who does not migrate to Darul Islam, his property is insecure. Imam Yousuf holds a different view. He maintains that a Muslim or Zimmi whoever goes to Darul Harb is bound to abide by the injunctions of Islam and, therefore, he cannot do any act forbidden by Islam, although it may be lawful in Darul Harb. Since there are explicit provisions in the Shariah declaring usury unlawful, it is forbidden both in Darul Islam and Darul Harb. According to Imam Muhammad there is a difference between money transactions entered into with a Harbi and with a Muslim of Darul Harb who decides to live on there. He says that money transaction with a Harbi involving usury is permissible for the reason given by Imam Abu Hanifa, but such a transaction is disallowed with a Muslim of Darul Harb who does not move to Darul Islam.[2] The Hanifite jurists are all agreed that a Muslim and a Zimmi cannot

1. *Badae'-wal-Sanae'* Vol.7, p. 133.
2. *Badae'-wal-Sanae'* Vol.7, p. 132.

enter into money transaction with each other. However if they enter into such a transaction while in Darul Harb, they are not liable to punishment; for at the time of such a transaction the Islamic government does not have jurisdiction over the place where the transaction is entered into. But the party receiving interest will have to pay compensation for it by returning the amount of interest received by him, even if the other party is in Darul Harb. The repayment of the amount of interest is no punishment. To ensure the payment of compensation, it is enough that the Islamic government has authority over both the parties when the claim is preferred.

If a Muslim or a Zimmi pays a visit to *Darul Harb* as a protected person and lends money to a Harbi or borrows money from him and thereafter returns to *Darul Islam* followed by the Harbi debtor or creditor the Qazi is incompetent to decide the case preferred by either party. Similarly if one party usurps the property of the other party, it will be beyond the jurisdiction of the Qazi to give any verdict in the matter. The reason for this is that to lend money in Darul Harb is ultra vires as the Islamic government has no jurisdiction over Darul Harb; nor does the jurisdiction of Darul Harb extends to us. So also is the case of usurpation or wrongful seizure of property. Besides lending of money and wrongful seizure of property pertains to something insecure for, as a matter of fact, seizure of the property of the people of Darul Islam is lawful for the people of Darul Harb just as the seizure of the property of Harbis is lawful for the people of Darul Islam. However a Muslim or Zimmi is bound by the agreement of protection to refrain from doing anything during his stay in Darul Harb that may cause injury to the people there and to do justice to them just as the people of Darul Harb on their part are under the obligation to do justice to a protected Muslim or Zimmi and refrain from causing him injury. Usurpation of property by either party amounts to wrongful seizure, although such act constitutes breach of agreement inhibiting injustice and causation of injury by one party to the other. But breach of agreement does not warrant to prohibition of the seizure of lawful property or authorization of the seizure of unlawful property.

The same injunction holds good in the case of two Harbis who enter into money transaction with each other in Darul Harb and come to stay in Darul Islam as protected persons. No judgement can be passed in respect of such a transaction in Darul Islam; for the government thereof has no authority over the parties either at the time of transaction or when the claim is preferred. However, if they come to Darul Islam after embracing Islam, their case can lawfully be decided, inasmuch as the jurisdiction of Islamic government extends to them when the case pertaining to money transaction is filed by the party concerned.

If a Muslim or Zimmi wrongfully seizes the property of another Muslim or Zimmi or borrows money from the latter, he will not be awarded any punishment. However, he will be ordered to repay the money borrowed or pay compensation for the property seized by him. The reason for the payment of loan or compensation is that at the time of presenting the claim the government of Darul Islam regains authority over both the parties.

To sum up, according to Imam Abu Hanifa a Muslim or Zimmi committing an offence against a Harbi during his stay in Darul Harb will not be liable to punishment as the Muslims do not have jurisdiction over the place of offence when it is committed. If the aggrieved person and his heirs claim indemnity in Darul Islam for the offence committed against him, there will be no special court to hear the case of the aggrieved party. This injunction holds good when the aggrieved person is not a Harbi but happens to be within the jurisdiction of the Harbi such as a Muslim prisoner or a Muslim of Darul Harb who does not migrate to Darul Islam.

Even if the aggrieved person belongs to Darul Islam, the offences committed against him will not be punishable, inasmuch as the place where they are committed is beyond the jurisdiction of the Muslims. However, the courts of Darul Islam will be empowered to decide the claims of financial indemnity preferred by the aggrieved party or the heirs thereof for offences committed in Darul Harb. The courts in fact are under obligation of deciding such claim of indemnity, although indemnity is also treated as a punishment for certain reasons, for instance, *diyat* is looked upon

1. *Badae'-wal-Sanae'*, Vol. p. 132 and 133.

as a punishment from one standpoint and material compensation from another. In short, the court in such cases cannot award punishment, as such. However, it is not impermissible to award punishment by way of recompensing the loss of the aggrieved party for the decision in such a case does not constitute a judgement aimed at compensating the aggrieved party and not at punishing the offender.

This, then is, in a nutshell, the position of Imam Abu Hanifa as to spatial aspect of the application of Islamic Shariah. His view that the injunctions of the Shariah do not apply to a protected person has produced adverse effects on Islamic countries. It has, in effect, served to justify grant of special privileges to the foreigners in Islamic society.

It is common knowledge that the Muslims had to hear and are still bearing serious consequences of the special privileges they bestowed in their palmy days on the powerless and insignificant non-Muslims. When the Muslims were at the acme of their political power, they encouraged non-Muslims, invited them to Darul Islam, offered them important offices and guaranteed security of their life and property. But when the Muslim power was on the decline those very non-Muslims served as a tool for the exploitation of the Muslims. They were instrumental in depriving the Muslims of their fundamental rights and formed conspiracies to pave the way for the domination of foreign non-Muslims over them.

(215) The Second View

The second view is expounded by Imam Yousuf, a major jurist of the Hanifite School. According to him, is applicable to all the individuals in Darul Islam, whether he or she is a Muslim, Zimmi or one temporarily staying therein such as a protected person. The tenor of Abu Yousuf's argument is that Muslims are under the obligation to follow the injunctions of Islam because they are Muslims and Zimmies are under similar obligation because they are bound by contracted undertaking which ensures them permanent security of life and property, while a protected person will abide by the injunctions of Islam because of the provisional agreement under which he is allowed to enter Darul Islam. According to this agreement he obtains the permission to stay in

Darul Islam and undertakes to follow Islamic injunctions during his stay there. It is actually on this condition that he is allowed to stay in Darul Islam. Thus he will be governed by the same rule as a Zimmi with the difference that the Zimmi is guaranteed permanent protection while a foreigner is guaranteed protection for a short period. Hence however short the period of his stay, a protected person will be apprehended and punished for any offence he commits in Darul Islam, whether the offence amounts to the violation of the rights of individuals or the rights of community.

The point of difference between Imam Abu Hanifa and Imam Abu Yousuf is only the question of the applicability of Shariah to the protected person. The latter maintains that the provisions of Shariah apply to a protected person in all circumstances, whereas Imam Abu Hanifa holds that they apply to him only when individual's rights are affected.

Imam Abu Yousuf agrees with Imam Abu Hanifa that the provisions of Shariah are not extensible to offences committed in Darul Harb, even if the offenders are citizens of Darul Islam. But there are two questions on which Imam Abu Yousuf holds a view different from that of Imam Abu Hanifa. In the first place Imam Abu Yousuf maintains that no Muslim or Zimmi or a visitor to Darul Harb can enter into any transaction involving usury either with a Harbi or Muslim of Darul Harb who has not migrated to Darul Islam. Although such a transaction is not unlawful in Darul Harb, according to the injunctions of Islam usury is at any rate strictly forbidden and adherence to these injunctions is obligatory everywhere. It is another that Muslim or Zimmi is not liable to punishment for the amount of usury received by him in Darul Harb, inasmuch the place of offence is beyond the jurisdiction of Darul Islam when the offence is committed. The points of difference between the two *Imams* here is that Imam Abu Hanifa does not regard the act as intrinsically unlawful, whereas Imam Abu Yousuf does. The second point of difference between them is the question of Muslim captive killed by a Muslim or a Zimmi in Darul Harb. Imam Abu Hanifa maintains that such an act is neither punishable by retaliation *(qisas)* nor does it entail payment of *diyat* because the guarantee of his security lapses as soon as he is taken a captive. Imam Abu Yousuf on the contrary holds that the payment

of compensation is obligatory because captivity does not nullify guarantee of security but the place of murder being beyond the jurisdiction of Darul Islam the killer will be liable to imposition of *diyat* as a compensation for murder. He argues that since the plaintiff and the defendent both belong to Darul Islam, the Islamic courts will be competent to order payment of compensation for offences committed in Darul Harb; for the courts will have jurisdiction over both the parties if not over the place where the offence is committed. The difference of opinion between *the* two *Imams* here is the same as on the first question.

(216) Third View.

The third view is advocated by the three Imams Malik[1] *Shafi'ee*[2] and Ahmed.[3] They maintain that the Shariah is applicable to every offence committed within the territorial limits of Darul Islam, whether the offender is a Muslim, Zimmi or a protected person. A Muslim is subject to the application of Islamic injunction because of his faith. A Zimmi is subject thereto because of the guarantee of security. He or she is under the obligation to abide by the Islamic injunctions in lieu of the permanent protection of life and property enjoyed by him in Darul Islam under such guarantee. The same rule holds good in the case of protected person, who comes to stay permanently in Darul Islam after obtaining permission and assurance of protection. He will therefore have to abide by the injunctions of Islam. According to the above *Imams* the only difference between a Zimmi and a protected person is that the latter's stay in Darul Islam is temporary whereas a Zimmi is a permanent resident thereof. If a protected person flees from Darul Islam after committing an offence, the punishment he is liable to will not be annulled by his flight from Darul Islam. He will be punished whenever he could be apprehended.

These Imams hold that a Muslim or *Zimmi* is liable to punishment for whatever offence he is guilty of during his stay

1. (a) *Mawahib-ul-Jaieel*, Vol.3, p. 355-365
   (b) *Al -Mudaw*, Vol. 16, p. 591.
2. *Al-Muhazzab*, Vol.2, p. 53-58.
3. (a) *Al-Mughni*, Vol.10, p. 439-537.
   (b) *Al Sharh-ul-Kabeer*, Vol.9, p.383.

in Darul Harb. On the contrary, a Harbi will not be amenable to punishment in Darul Islam for an offence he may have been guilty of in Darul Harb. A Harbi will be bound by this injunction of Islam only from the time of his entry into Darul Islam. As for a Muslim or Zimmi, it does not make any difference whether he commits a crime in Darul Harb or in Darul Islam. An act declared unlawful by Islam is unlawful everywhere. Now if difference of states does not affect the unlawfulness of an act, it would entail the same punishment regardless of the place where it is committed. Thus a Muslim or Zimmi will be liable to punishment for any act declared unlawful by the Shariah, which they commit in Darul Harb, even if that act is lawful there, for example a money transaction involving usury. This is true of an obverse case as well, i.e. an act permissible according to the Shariah but unlawful, in Darul Harb will not be punishable in Darul Islam.

If a Zimmi decides to leave Darul Islam for good but returns to it after committing an offence in Darul Harb, he will not be liable to punishment for the offence. The reason for this is that he becomes a Harbi on account of emigration and is not, therefore, under the obligation at the time of committing the offence.

If a Muslim turns an apostate, quits Darul Islam, commits an offence in Darul Harb and returns to Darul Islam after embracing Islam again, he will not be awarded any punishment in Darul Islam for the offence in question, for he was not bound to abide by the injunctions of Islam when he was guilty of it.

All the three major jurists advocating the view under discussion regard a camp of Islamic army as a part of the Islamic state even if it happens to be within the territorial limits of Darul Harb. According to them an offence committed either within the perimeter of the camp or beyond it is punishable alike for reasons stated above.

Imam Malik and Imam Shafi'ee are of the view that punishments for offences committed by the soldiers should not be put off till their return to Darul Islam. They should be punished there and then except when the commander of the Muslim army is not vested with the power to do so or the offender is needed by the Muslims or is a source of strength to them. This last mentioned exemption is advocated by Imam Shafi'ee alone.

Imam Ahmed is in favour of the postponement of punishment till the return of the offender and the army to Darul Islam. This view accords with the position of Imam Abu Hanifa which we have already discussed at length.

The principle underlying the position of the three Imams Malik, Shafi'ee and Ahmed is that both Muslim and Zimmi will be punished for offences they are guilty of it in Darul Harb. This principle applies to crimes entailing *huds*, *qisas* and *diyat* as well as those involving penal punishment laid dawn by the Shariah or determined by the ruler. But it does not apply to all the crimes in the same proportion and on the same place, inasmuch as all crimes are not uniform in spirit. For instance, punishment for the *hud* and *qisas* crimes committed in Darul Harb is obligatory and ruler a person in authority is not empowered to pardon such crimes or remit punishment thereof. On the other hand, the ruler is vested with the power to pardon those crimes after commission thereof which require penal punishments prescribed by the Shariah though they are essentially punishable. As for the acts which the ruler declares unlawful, it is permissible both to award and not to award punishment for them as the ruler deems fit. Since they constitute acts prohibited by the ruler himself he is competent to declare them lawful again. On the same grounds he is empowered not to award punishment, for acts he declares crimes, which are committed in Darul Harb is not obligatory.

This then is the upshot of the view advocated by the three Imams. But from the standpoint of Imam Abu Hanifa and Imam Abu Yousuf, on the contrary no crime committed in Darul Harb is punishable, inasmuch as the place where the crime is committed happens to be beyond the jurisdiction of Darul Islam at the time of the commitment thereof. Hence in no case will punishment be awarded for a crime committed in Darul Harb.

(217) Difference Between Shariah and Law.

The three views discussed above constitute the doctrines of Islamic jurisprudence. Modern Laws also contain similar concept, which are as follows:—

(1) Law should be applied only to the subjects of the state. It should not be applied to any one other than a subject of

the state within or without the territorial limits thereof. This doctrine was common during the Middle Ages and bears affinity to the view expounded by Imam Abu Hanifa, which requires application of law to subjects of the state, to the exclusion of foreigners.

The only difference between Imam Abu Hanifa's position and the legal doctrine of the Middle Ages is that the latter extends the provisions of law to the subjects of the state outside the territorial limits thereof, whereas Imam Abu Hanifa does not advocate such extension of legal provisions.

(ii) Law must be applied to all the people living in the state whether nationals or foreigners. They must be held and punished for offences committed by them within the territorial limits of the state. This doctrine was widely accepted till the 19th century. It is exactly the same doctrine as is advocated by Imam Abu Yousuf.

(iii) Provisions of law are to be applied to all the people living in the state both nationals and foreigners in respect of not only the offences committed within the territorial limits thereof but also some of those committed by them abroad. This doctrine has been adopted in all the statutes in force today including the Egyptian Law. There is little difference between this doctrine and the one expounded by the three Imams Malik, Shafi'ee and Ahmed, except that these jurists regard punishment for some of the offences committed abroad as obligatory admitting of no discretionary powers for the ruler to pardon them and some other offences as punishable at the discretion of the ruler who is vested with the powers to award or not to award punishment. Whereas the modern doctrine allowed full powers to the legislature to provide punishments for all the crimes committed abroad, if it so deems fit.

But, in effect, there is hardly any difference between the doctrine expounded by the three jurists of Islam and the modern legal tenet; for according to the former punishment for such offences is imperative as are most dangerous and significant and it is in the interest of the state that offenders guilty of them are, of necessity, punished.

(218) How can Islamic Doctrines be Applied in The Presence of Different Islamic States?

It is noteworthy in this context that the world according to them is divided into two parts. Darul Islam and Darul Harb. Some scholars take this division of the world to mean that there should be a single Islamic state reigning supreme over all the Muslim countries and a single non-Islamic state reigning supreme over all the non-Muslim countries. The Islamic doctrines are not based on the assumption that the Islamic countries are to be under the rule of a single paramount power. Thc idea under lying these doctrines is that the Muslims of the world are to be united, integrated and politically homogenous. Supremacy of a single state is not the only means to achieve these objectives. They can also be realized by the cohesion and political identity of Islamic countries. It will not be incompatible with Islam if the Islamic countries adopt a pattern similar to that of USA, USSR or the British Commonwealth or the one like the Arab League which aims at bringing about unity of purpose among the Arab countries. In a similar fashion all the Islamic countries may be blended into a Islamic block designed to inculcate among them unity of purpose and sense of common destiny, find solution to their internal problems and resolve their mutual differences. In short, no system designed to realize the Islamic objectives could be in conflict with Islam. The most important of these objectives is the formation of an Islamic block vis-a-vis the non-Muslims. Our standpoint is strongly supported by the facts of history. The doctrines discussed above were formulated during the Abbaside period when the political power of Islam was divided into three states, i.e. the Abbasides ruling in the East, the Alavies in the West and the Omayyads in Spain. The doctrines in question were in operation even when a separate Muslim state was established in every region.

According to these doctrines all the non-Muslim independent states are constituents of Darul Harb. That is the reason why the Muslims had been at war with Turkistan, Russia, India, Spain, France and Rome simultaneously. They regarded all these countries as Darul Harb.

In other words the division of the world into Darul Islam and Darul Harb does not mean that the world should be bifurcated

into two states or political units. It is in a sense intrinsic division implying that the one part thereof is a heaven for the Muslims where they can enjoy peace and security and the other is a hostile camp posing a constant threat to their security. All the independent Muslim states have been treated as Darul Islam because all of them are subject to the same law and the same *Shariat*. Looked at thus, they constitute an indivisible constitutional unit despite social diversity and regional barriers. Similarly non-Muslim states are regarded as a single political unit notwithstanding their social and ideological differences, inasmuch as they are fundamentally identical from the Islamic viewpoint. This is the rationale of the division of the world. It is, therefore, right to divide the world into Darul Islam and Darul Harb.

To sum up, the existence of numerous Islamic states is no impediment in the implementation of the Islamic doctrines today as it has never been in the past. If they were applied in Spain, North West Africa, Egypt and Baghdad in the past, they can be translated into practice likewise today in Egypt, Lebanon, Syria, Iraq, Hijaz, Pakistan and every other Islamic State.

In fact these doctrines can easily be put into effect under the present dispensation, provided that every Muslim state should consider itself a representative of Islam not only within its own territory but also in the rest of the world. First if we propose to apply the doctrine of Imam Abu Hanifa in Egypt, we will in the first instance, award punishment for every crime committed in Egypt, whether the offender is a Muslim or Zimmi or whether he belongs to Egypt, Syria, Iraq, Palestine or Iran, as the citizen of one Islamic state is not an alien in another Islamic state and all the Muslim countries are the components of Darul Islam by virtue of the same Shariah in force therein. Secondly, we will award punishment for every offence committed in an Islamic country regardless of the fact whether the offender has permanently settled down in Egypt or has come to stay there for the time being provided that he has not been punished for the same offence at the place where he commits it or in any other Muslim country. If punishment awarded to him in a Muslim country does not accord with the provisions of the Shariat he will be awarded one prescribed by the Shariah. The reason for this is that all the

Muslim countries constitute Darul Islam despite their respective autonomous governments and that it is incumbent on every Muslim state to enforce Islamic injunctions eradicate evil and prevent the people thereform. And in order to eradicate evil it is essential to pass the sentence as provided for in the Shariah.

The foregoing statement applies to offences entailing *huds, qisas, diyat* and penal punishments laid down in the Shariah. Considering the fact that the ruler or person in authority is empowered to pardon penal offences or remit penal punishments to the exclusion of the *hud, qisas* and *diyat* offences, it does not hold good in the case of such acts as are declared offences by himself. Punishments for such offences will be awarded only at places where they constitute criminal acts, at places where they are committed, as well as, at places where legal proceedings is instituted against the offender. No punishments will be awarded for them in any other country whether they are lawful or unlawful at places where they are committed.

The difference between the *hud* and *qisas* crimes and penal crimes must be borne in mind. In the case of the *hud* crimes, it is incumbent upon every Muslim to apply the prescribed punishment to the offender. Delay in such punishments is improper, and it is impermissible to remit them. In the case of crimes entailing qisas, punishment is imperative unless the aggrieved person or his heirs forego it. If one Muslim state does not enforce the *Shariat* provisions enjoining *huds* and qisas, other Muslim states must enforce them. If other Muslim states also fail to fulfil this obligation, then it is incumbent upon the individuals to enforce *huds* and qisas. However, it is permissible to suspend or remit penal punishments.

The difference between acts constituting offences according to the Shariah and those declared as such by the person in authority is that the former can in no case be lawful although it is permissible to remit punishment thereof; whereas acts that assume the character of penal offences under the orders of the ruler may become lawful again. Such offences may be pardoned and the punishment thereof remitted.

If we apply the doctrine expounded by Imam Abu Yousuf, we shall, apart from the cases discussed above, punish every protected person who commits an offence in an Islamic state but

is not awarded punishment therein or who may be awarded a punishment other than the one laid down in the *Shariat;* for a protected person pledges to abide by the injunctions of Islam by his entry into Darul Islam. It is incumbent upon every Islamic state to enforce the injunctions of Islam and every Islamic state is empowered to punish a *Zimmi* or a protected person according to the *Shariat* who commits a crime while in Darul Islam irrespective of the fact whether the crime is committed within the territory thereof or in another Islamic country.

If we act on the doctrine advocated by the three Imams Shafi'ee, Malik and Ahmed we will have to award punishment not only in all the three cases mentioned above but also in case if a Muslim or a Zimmi citizen of an Islamic state commits such crimes during his stay in Darul Harb as entail *huds, qisas, diyat* and penal punishments laid down in the Shariah Every Islamic state is vested with the power of punishing the citizens of all the Islamic states for these crimes, for every Islamic state is under the obligation to enforce the huds prescribed by the *Shariah.* If one Islamic state can not do so, then the one which can, ought to do it.

If offences committed abroad consist of such acts as are declared criminal by the country's legislator, the government of the country where such acts are unlawful may punish its own citizens as well as citizens of those states where they constitute offences. But citizens of state, where the acts in question do not constitute offences cannot be punished in a state where they do; for absence of punishment for them in the former state amounts to their being lawful there. An offender who commits a crime in a state and then moves to another Islamic state where it is no crime will not be punished in the latter because the act in question is lawful in it. However, this state may extradite the offender to the country where he commits the offence.

It is not necessary that criminal acts for which punishment is awarded in Darul Islam should be unlawful in Darul Harb as well inasmuch punishment relates to the Islamic Shariah which Muslims and Zimmies both are under the obligation to follow.

Hence it makes no difference at all whether they are lawful or unlawful in Darul Harb.

(219) Effect Produced by the Application of Shariah.

We learn from the foregoing discussion that citizens of an Islamic state are liable to prescribed punishment for the offences committed by them within the country as well as abroad. If the accused succeed in escaping into another Islamic country they cannot be immune from prosecution and the punishment laid down by the Shariah for all the Islamic countries are subject to the same law *(Shariat)* and every one of them being a part of Darul Islam, is a representative of all the other Islamic countries in respect of the enforcement of the provisions of *Shariah* and the *hud* prescribed therein.

This, in effect, would be the outcome of the application of the doctrine of Islamic jurisprudence and it is exactly the kind of order the pundits of modern law are dreaming of. They crave for. the uniformity of criminal laws all over the world, in order to make every country representative of all the others so that if the offender from one country manages to flee to another, he may not escape the prescribed punishment. In other words, wherever he goes he gets the same punishment to which he is liable at the place where he commits it.

This, then, is the cherished goal of legislative bodies of international laws. They believe it to be the only way to eradicate crime. However, this beautiful dream of theirs was realized by the Islamic Shariah thirteen hundred years ago. It is the very golden concept which the Shariah has sought to put into effect right from the very beginning or from the time when the Muslims spread out into different parts of the world. At any rate Islamic Shariah has the distinction to set nobie precedents and lead the van in establishing a global legal order of which the moderns are dreaming today. In fact the man made laws with their new systems and beautiful visions are following the Islamic Shariah, and yet they have not been able to approximate thereto.

(220) What is Darul Islam?

Darul Islam comprises all those countries where the Muslims

are in power whether they are in a majority or not. It also includes all such regions as may have come under the Muslims rule and whose citizens both Muslims and non-Muslims, have accepted Islamic injunctions. Moreover, it extends to those regions where the Muslims live and follow the injunctions of Islam above board without any interference.

Again, all the adjoining hills plains, rivers, contiguous waters, islands and the air space are also parts of Darul Islam. The area of Darul Harb where Islamic army is encamped and, on the analogy thereof the war ships of Islamic navy too fall within the jurisdiction of Darul Islam.

A general principle of the Shariah is that the oceans of the world do not belong to any one. This principle is also incorporated in the modern international law. There is nothing in the *Shariat* which inhibits declaring the sea contiguous to a littoral state its territorial waters up to a certain limit.

The jurists, however, have nothing to say about the civilian ships. But Imam Abu Hanifa and his follower's doctrine, by application, provides us some guidance in this respect. According to this doctrine, if any offence is committed aboard a civil ship within the sea limits or coastal belt of Darul Harb no punishment will be awarded for it. But if the sea belt comprises declared limits of the territorial waters of Darul Harb or the ship happens to be beyond the limits of territorial waters of Darul Harb or the Ship happens to be beyond the limits of territorial waters of any country or in the middle of the sea, then the provisions of the Sharia must be applied.

The trial of jurists (Malik, Shafi'ee and Ahmed), however, holds that punishment must be awarded for offences committed on merchant ships, whether they happen to be sailing at the moment within the sea limits of Darul Harb, Darul Islam or in open sea. In this combat the difference we have noted between the *hud* and *qisas* offences on the one hand and the offences entailing prescribed penal punishments on the other as well as penal crimes as determined in the Shariah and acts declared offences by the ruler should be kept in view.

The foregoing rules apply to planes as well. All offences

committed aboard warships are punishable. War planes are subject to rules similar to those applicable to a military camp and warships, while merchant planes are subject to the same rules as merchant ships.

(221) Shariah vis-a-vis Law.

In all the matters discussed above man made laws are in agreement with the Shariah. According to these laws also the air space over a country is a part of its territory; the seas contiguous to littoral states fall within the jurisdiction of their respective governments; warships are subject to direction of the states to which they belong and merchant ships are bound by the laws of their respective countries provided that they are in their territorial waters or in the open sea. However, rules vary from country to country so far as the ships of one state happen to be in the territorial waters of another. Under the sea laws of Britain and some other countries if a ship is in the territorial waters of a foreign country, she is subject to the laws of that country rather than of her own. This accords with the doctrine advocated by Imam Abu Hanifa and Imam Abu Yousuf. A majority of the countries, on the other hand, would treat the ship as subject to the laws of her own land and this exactly is the position held by the three Imams comprising Malik, Shafi'ee and Ahmed. According to the French law, however, such a ship under a certain set of circumstances is subject to the laws of the foreign country in whose territorial waters it happens to be at the moment, while under a certain other set of circumstances the laws of her own land will apply to her. In other words the French statute combines both the standpoints.

(222) Extradition and Banishment of Offenders.

We have observed that all the Islamic countries are representatives of Islam in the matter of the application of the Shariah. For instance an Iraqi who commits an offence in his own country will be liable to prosecution in Egypt as well. But the question of a Muslim, Zimmi or protected person, having committed an offence in an Islamic country manages to escape into another Islamic country or Darul Harb and the former country demands his extradition for the purpose of his trial, will it be

possible to extradite him for the said purpose? Again, certain culprits are notorious for the commission of offences and breach of peace. Can the state to which they belong banish them? These two questions will be the next subject of our discussion.

(223) First Question:Extradition of Criminals.

It may be said that trial of an offender at the place where he commits the offence is better than at any other as justice at the former place can be ensured in a better way and it is also best suited to warn the people against the offence. The reason for this is that proofs can easily be produced and cogent arguments can be advanced at the place where the scene of offence is situated because witnesses are available there, the signs and evidence of offence are open to direct examination and all the circumstances thereof can easily be grasped. Besides, if the offender is punished where he commits the crime, the importance of punishment is not lost sight of and its purpose is better served. The purpose of punishment is two fold. On the one hand it is designed to chastise the offender and on the other to warm those who may have witnessed the commission thereof. If the offender is punished at a place other than that where the offence is committed only one end of punishment is served; while the other object of warning the people cannot be achieved. It is therefore preferable to hand over the offender to the country wherein he may have committed the offence regardless of the fact than legal proceedings against the offender in the country where he takes refuge are not of great harm and the law of that country is identical with the law of the original country.

It may also be said that if an offender belonging to a country is handed over for trial to another country where he commits the crime he may not be able to defend himself amidst, an alien people belonging to a different race and speaking a different language. In fact, if the offender is handed over to such a country he is likely to be wronged.

These are two ideas that come into one's mind when we consider the question of handing over an offender. Both of them have their merits and demerits. In order to fulfil the demands of justice as far as possible and to safeguard the citizens of an

Islamic state against any possible injustice, the *Shariat* has Adopted a via media taking into account all the aspects of the problem. It has therefore, drawn a line of distinction between the transfer of the culprit to an Islamic state on the one hand and a non-Islamic state on the other.

(224) Extradition of Offender to Islamic State.

There is no provision in the Shariah prohibiting the extradition of an offender whether a Muslim, Zimmi or protected person by the Islamic state where he may have managed to escape to the Islamic state where he may have committed the crime, provided that the former has not already been tried and punished in accordance with the Shariah, inasmuch as it is wrong to punish an offender twice for the same crime. But if he has not been tried under the provisions of the Shariah by the Islamic state wherein he seeks refuge, that state cannot prevent the transfer of the culprit to the country which wants to deal with him in accordance with the *Shariat;* for punishment and legal proceedings inconsistent with the Shariah are futile. Legal proceedings such as these would be invalid, inasmuch as they are conducted under provisions which the Shariah does not recognize. If the state from which extradition of the offender is demanded intends to proceed against him according to the Shariah, while the state demanding his extradition does not apply to him the injunctions of the *Shariah* or has no intention to do so, the former shall not extradite him. This however, would hold good only in the case of offences entailing prescribed punishments, viz.; the *hud* and *qisas* crimes.

There is one and only one reason for both the extradition and refusal to extradite an offender and that is the representative character of every Islamic state as a member of Darul Islam. Every member country of Darul Islam is under the obligation to establish the *Huds* laid down by Islam and to enforce Islamic injunctions. Hence if an offender is extradited, he is not returned or handed over to an alien country; no *anti-Shariat* law is brought to bear upon him, nor he would be subjected to injustice and wrongful treatment. The real object is to do justice and punish the culprit. Refusal to hand him over to another Islamic state also aims at the enforcement of the provisions of the *Shariat,* ensure justice and chastise the culprit.

(225) Extradition of Offender to non-Islamic State.

The Shariah disallows the extradition of a Muslim or Zimmi citizen of an Islamic state to Darul Harb for the purposes of instituting legal proceedings against him for an offence he may be alleged to have committed there. Similarly no Islamic state is authorized to hand over a citizen of another Islamic state to non-Islamic country; for from the viewpoint of the Shariah he is a subject of the first mentioned Islamic states as well.

The Shariah, does not allow any Islamic state to extradite a Muslim to Darul Harb, who migrates therefrom to Darul Islam and whose return is demanded by Darul Harb except that his return is pledged under an agreement. If an agreement to this effect exists, then its terms and conditions must be honoured with the exception of such terms and conditions as are invalid. In case honoured with the exception of such terms and conditions as are invalid. In case if such an agreement is effective in retrospects, i.e. if it contains a provision to the effect that all the Muslims who may have migrated to Darul Islam before the signing of the agreement should also be returned, then the agreement will be null void. Also every agreement will be invalid which provides for the return of any Muslim woman who may-have migrated to Darul Islam before and after the signing thereof. Handing over of a Muslim woman to a non-Islamic country is permissible under no circumstances, even if she belongs to Darul Harb and her husband, children and other members of the family want her to be sent back to Darul Harb. Says Allah:

> "O ye who believe! When believing women come unto you as fugitives, examine them. Allah is best aware of their faith. Then, if ye know them for true believers send them not back unto disbelievers. They are not lawful for the disbelievers nor are the disbelievers lawful for them."
>
> (60:10)

Jurists, however, differ on the question of returning Muslim men after the conclusion of the agreement. Imam Ahmed and some jurists of the Maliki school regard this condition as proper and binding. On that contrary Imam Abu Hanifa, and some other jurists of the Maliki school look upon it as un-warrantable; for according to them the imposition of non-Muslim upon a Muslim

is not permissible in any circumstances. As opposed to these views is the position taken by the Shafi'ee school, which concedes the return of a Muslim male to Darul Harb under the condition that there exists in Darul Harb his family or tribe which could protect him. But in the absence of such a family or tribe his return is disallowed by the jurists of this school.

It may be mentioned that a citizen of Darul Harb who migrates to Darul Islam after embracing Islam acquires the citizenship thereof. The refusal of an Islamic state to return him to Darul Harb actually amounts to the refusal to give up its own citizen, and it conforms to the general rule of the Shariah that no Islamic state is competent to extradite any of its citizens to a non-Islamic country. But his extradition to another Islamic state is not inconsistent with the general rule of the Shariah, inasmuch as all the Islamic countries are governed by the same Shariah and every Islamic state is representative of Islamic system in the world.

An Islamic country however, is authorized to return a protected person if his country demands his extradition alleging him to have been involved in an offence there provided that the two countries are bound by a mutual agreement to this effect. But no Islamic country is allowed to hand over a protected person to another country as it would violate the pledge of protection made to him by that country under which he considers himself secure; provided that there is no agreement to the contrary between the Islamic country and the country demanding his extradition. In the presence of such an agreement the protection guaranteed to him will not prejudice his extradition.

The principle of Islamic Shariah prohibiting the extradition of its citizen by one state to another is one which most of the countries have adopted today. However, some countries like Britain and U.S.A. are excepted. These countries deem it fit to give up their citizens to other states. But the Shariah allows the extradition of citizens from one Islamic state to another Islamic state. In short both the principles which are generally in force in the world today are the same as those laid down by the Shariah with the only difference that both the *Shariat* principles are applicable

simultaneously, whereas some of the modern countries adopted only one of the two principles discarding the other.

Modern states of the world are agreed that if any person subject to a sentence passed by a state in respect of an offence he is guilty of is wanted by another state in connection with the same offence he should not be handed over even if he is a foreigner. This principle, too, is a corollary from the Shariah for if a country tries an offender for an alleged offence it does so, in order to award him punishment. Now if punishment has once been awarded to him, there is no point in handing him over.

(226) All the modern countries are agreed that fugitive slaves should not be extradited. This principle emerged in the wake of the abolition of slavery only in the nineteenth century; whereas the Islamic Shariah adopted it fourteen hundred years ago. To be exact, it was recognised on the day of Hudaibia. Many slaves of the Quresh on that occasion ran away from their masters and took refuge in the Islamic camp. The Quresh demanded their return and sent a message to the Prophet (S.A.W.) saying that it was not the charm of Islam which drew them to the Islamic camp but the bondage of slavery which they wanted to get rid of by seeking refuge with the Prophet. On hearing the emissary of the Quresh some of the Companions of the Prophet (S.A.W.) said that the Quresh were right. This angered the Prophet (S.A.W.) and he retorted, "These slaves have been set free by Allah."

According to the principle of the Shariah a slave who embraces Islam and migrates to Darul Islam or remains in Darul Harb after embracing Islam till such time that the Muslims bring Darul Harb under subjugation, he will be free, and under no circumstances will be handed over to Darul Harb.

Imam Shafi'ee, however, is of the view that extradition of a slave is justified in one case and that is when he migrates to Darul Islam having embraced Islam, but at the same a treaty of peace between Darul Harb and Daru! Islam is in force. In such a case he will be handed over to Darul Harb since slaves constitute property and under the peace treaty the people of Darul Harb are guaranteed the security of life and property. Imam Ahmed refutes this argument on the ground that security is guaranteed only for such things as are in the power and possession of the Muslims

but slaves are not in possession of the Muslims They are rather possessed by the people of Darul Harb.

(227) Political and Military Offenders

Modern countries also agree that political and military offenders should not be extradited. There is nothing in the general principles of the Shariah discussed above that contradicts such particulars rules. Hence these rules are consistent with the Shariah.

(228) Can those Darul Harb Immigrants be punished who come to Darul Islam After embracing Islam?

We know that the Shariah does not allow extradition of women to Darul Harb under any circumstances. It does not permit the extradition of even menfolks unless an agreement between Darul Harb and Darul Islam exists to the contrary. Jurists differ on the question of handing over of menfolk even in the presence of an agreement to that effect. Hence the question arises if a Muslim who has come away to Darul Islam after committing an offence in Darul Harb, is amenable to punishment? There are two assumptions involved here which must be distinguished. The first assumption is that he may have committed the offence before embracing Islam and the second is that he may have committed it after professing the Islamic faith. In the former case the consensus of the jurists is that he is not liable to punishment inasmuch as according to a general principle of the Shariah Islam invalidates past deeds. This principle is grounded in the following divine injunction:

> *"Tell those who disbelieve that if they desist, that which is past will be forgiven them."* (8:38)

This is a comprehensive principle. It extends even to those who persecuted the Prophet (S.A.W.) and his followers, slew the Muslims and disfigured their corpses as for example Kaab bin Ubaiye who afflicted the Prophet (S.A.W.) and his followers by his invective or Wahshi who killed Hazrat Hamza or Abu Sufyan's wife Hinda who disfigured his body after the martyrdom of Hazrat Hamza.

If the offence is committed by the offender after embracing Islam he is, according to Imam Abu Hanifa and Abu Yousuf, not

liable to punishment. They argue that the offence is committed in Darul Harb, over which the Muslims have no authority; Whereas punishment is conditional to their domination over the place where the offence is committed. On the contrary the trial of Imams (Malik, Shafi'ee and Ahmed) holds that punishment is obligatory, provided that the offender knows or it is possible for him to learn that the act he has been guilty of is unlawful according to the Shariah. But if he is ignorant of the unlawfulness of the act and it is not possible for him either to find out that the act is forbidden by the Shariah, then he will not be liable to punishment. However, if he has the knowledge or can acquire the knowledge of the criminal character of the act he commits, he will be punished for such acts as are unlawful according to the Shariah but not for those which it does not forbid, although they may be unlawful in Darul Harb.[1]

(229) Banishment of Offenders.

There are different rules for the banishment of People belonging to Darul Islam and Darul Harb respectively:

Banishment of Muslims and Zimmies.

We have learnt that all, the Muslim countries are components of the same political entity known as Darul Islam. The result of treating Darul Islam as a single political unit is that no Muslim or Zimmi can be prevented from moving to another Islamic region apart from his own.

The rule laid down by the Shariah in this regard is that banishment of a Muslim or Zimmi is impermissible for if a Muslim is expelled from Darul Islam, he will land in trouble, his life will be imperiled and he will not be able to abide by the injunctions of Islam above board. The expulsion of a Zimmi from Darul Islam amounts to infringement of the agreement under which he is guaranteed the security of life and property.

Treatment of all the Muslim countries as members of the same political entity and prohibition of the banishment of a Muslim or a Zimmi imply that no Islamic country is allowed to expel a Muslim or a Zimmi, even if he does not belong to that country and may have come there for a short stay.

1. Also see articles 214, 216 and 298.

In short, the Shariah prohibits both the prevention of a Muslim or Zimmi from moving into and his expulsion from any Islamic state. The reason for this is that a Muslim or Zimmi is no foreigner in any of the countries comprising Darul Islam. In fact, every member country of Darul Islam and the government thereof is his own country and government.; for every Muslim country is first the representative of Islam and the Muslims in general as well as the Zimmies abiding by the injunctions of Islam and then the representative of his original land.

In view of the prohibition imposed by the Shariah on prevention by an Islamic state of any of its citizens from moving into another Islamic state or their expulsion from its own territories, it may be asked if national security and peace and tranquility of a state necessitate certain restrictions on the entry, will it be within its rights to resort to such measures? Again, if an Islamic state sends back an individual coming from another Islamic state under the pressure of similar necessity, can its action be justified?

The answer is that according to one of the basic principles of the Shariah every necessity is judged on its merits. This means that an action prohibited in normal circumstances becomes permissible under the pressure of necessity provided that such an action is proportional to it, that is, does not exceed the magnitude of necessity. In the light of these two rules the Islamic countries are authorized to impose restrictions on, entry into their respective territories if needed, but on the condition that the restrictions so imposed are commensurate with the requirement and there is no other way to fulfil the requirement. A Muslim country is also authorized to expel when necessary, a Muslim or Zimmi belonging to another Islamic country provided that there is no other course of action to deal with the situation. He may either be sent back to his own country or to some other Islamic state; but he cannot be banished to any of the Darul Harb countries even if it is bound by a peace treaty with such a country.

But to my mind it is improper on the part of an Islamic state to impose a ban on the entry of the national of another country. Under no circumstances an Islamic state is justified in dis-allowing a national of another Islamic state to enter its territory

on the pretext of his being a potential threat to its national security, peace and tranquillity; for every state has innumerable legal provisions and regulations designed to maintain peace whereby it may deal with every situation arising out of necessity to ensure internal security, guarantee the safety of every good citizen, keep an eye on every suspect and prevent him from activities inimical to the state. If a state can take so many measures without prejudice to any Shariat principle, it cannot obviously be permitted to take such actions on the pretext of necessity as may suspend important principles of the Shariah. Again, if a state cannot banish its own nationals or ban their entry but would rather take measures mentioned above against their subversive activities, it should above all, adopt the same measures to deal with the refugees and immigrants who will evidently be in a' weaker position than the national of that state.

For this reason it is incumbent on every Islamic state to refrain from expelling the nationals of another Islamic state and from preventing their entry; but should deal with them in the same manner as it does with their own nationals. When they are guilty of breach of peace they should be awarded the same punishment as is awarded to the national of the state in question. The opinion I have formed in this respect is the one which accords with the purpose of the Shariah and is in harmony with the objectives of the unity of Darul Islam. That is because Darul Islam is the heaven for every Muslim and Zimmi, where he has full sense of security and enjoys perfect peace. On the contrary, the view opposed to my opinion involves, besides what has already been mentioned, inequality and colour prejudice. Islam is dead against all such things.

(230) Expulsion of the Harbies.

According to the rules of the Shariah a Harbi can come to Darul Islam with special permission or under an agreement can stay there temporarily. Imam Abu Hanifa, Shafi'ee and some Hambali jurists are of the view that the maximum period permissible for his stay is one year.[1] *Imam Malik, on the other hand maintains*

1. (a) *Sharh Fath-ul-Qadeer,* Vol.4, p.351.
   (b) *Al Mughni,* Vol. 10, p. 437.

that the period of his stay has not been determined.[1] But Imam Shafi'ee fixes four months. However, according to him,[2] the head of the state may extend the period if he so deems fit.

On expiry of a Harbi's prescribed period of stay, the government of the Islamic state concerned may ask him to leave the country. He may be ordered to quit the country even before the expiry of that period if he is found to have caused breach of peace or if his presence' in the country is considered to be posing a threat to peace. Says Allah

> "If thou fear treachery on the part of a people, throw back to them (their treaty) on terms of equality. Surely Allah loves not the treacherous." (8:58)

Again,

> "So long as they are true to you, be true to them."(9:7)

However there is a condition attached to the expulsion of a Harbi he is to be sent to a country where he considers himself to he secure or back to his own country. This is because he comes to Darul Islam under an agreement of protection and should not naturally be thrown into any predicament imperiling his life but in pursuance of the following divine injunction be taken to a place where he is actually secure.

> "Convey him to a place of safety." (9:6)

The case of a Zimmi is different. Apprehension of breach of trust by him does not warrant his banishment. Such an action against him is not justified even if he does something indicative of breach of trust (treason) The difference between a Zimmi and a protected person is that the former is a citizen of an Islamic state and is domiciled there. As such he is under the control of the head of the state in the same way as a Muslim and therefore, if he commits a treacherous act he is liable to the same punishment as a Muslim is. But this is not true of a protected person whose breach of trust is a difficult case to deal with.[3]

1. (a) *Al Mughni* Vol.10, p.437.
   (b) *Mawahib-ul-Jaleel,* Vol.3, p.359.
2. *Asna-al-Matalib,* Vol. 4, p. 204.
3. (a) *Sharh Fath-ul-Qadeer,* Vol.4, p. 294.
   (b) *Mawahib-ul-Jaleel,* Vol.3, p. 386.
   (c) *Al-Muhazzab,* Vol.2, p. 294.
   (d) *Al-Mughni,* Vol.10, p.520.

(231) Difference Between the Shariah and Modern Laws on the Question of Expulsion.

In all modern laws a principle has been laid down to the effect that immigration of foreign nationals should be curbed and that if they manage to infiltrate into the territory of a state, they should be expelled. Again, under the modern laws foreign nationals may enter a country for a fixed period after obtaining permission to do so. If this period is not extended they are to be expelled on expiry thereof. The above principles, which the modern laws have only necently adopted were provided for by the Shariah fourteen hundred years ago. The modern laws are also in agreement with the Shariah on the inadmissibility of the banishment of a country's own nationals as well as of banning their entry into the homeland. But the modern laws do not accord with the Shariah on the question of a state's responsibility for conveying an expelled person to a safe place. They do not admit of such responsibility whereas the Shariah does. In fact most of the modern laws provide that a foreign national is to be expelled, regardless of the fact that his life may be imperiled after expulsion. The difference between the Shariah and the modern laws here needs no explanation.

(232) Standpoint of Shariah as to Nationality.

Nationality is determined in the Shariah on the basis of *'Dar'*. In other words nationality according to the Shariah owes itself to a treaty of peace with Islam, conformity to the Islamic injunctions and the refusal to conform thereto. Thus all the people of Darul Islam are individuals of the same nationality whether they are Muslims or Zimmies, subject to one or more governments whether Egyptians Iraqis or Moroccans:These are all distinctions of internal and regional nature and the Shariah does not base any of its injunctions on them; nor does it recognize any external effects of such distinctions.

Similarly the people of Darul Harb comprise a single nationality irrespective of its various countries and numerous governments. Regional distinctions such as being British, French or American are mere internal differences. The injunctions of Shariah are applicable to all of them alike both collectively and

severally. However, the Shariah does not prohibit dealing differently with different countries of Darul Harb as the situation demands. For instance, it is possible that the Muslims are at war with the British but peace prevails between them and the French.

In short nationality in Darul Islam is grounded in adherence to Islam and acceptance of its injunctions. One who embraces Islam is a Muslim while one who accepts the injunction of Islam is a Zimmi. In Darul Harb, on the other hand, the basis of nationality consists of the disbelief in Islam and rejection of its injunctions.

According to the Shariah nationality changes with a change of the basis whereon it rests. Thus by embracing Islam, passing into the custody of Muslims and accepting the injunctions of Islam, the nationality of a Harbi is transformed. The condition for taking a Harbi into the custody of Muslims is that he should migrate to Darul Islam. In other words no Harbi can be treated as a Zimmi as long as he is in Darul Harb, unless of course the whole country of Darul Harb is annexed to Darul Islam and the entire population thereof accepts the Islamic injunctions. In such a case the country annexed would acquire the status of Darul Islam. If a Harbi embraces Islam, his nationality is transformed into pure Islam and the requirement of his migration to Darul Islam need not be fulfilled, although Imam Abu Hanifa considers his migration essential for declaring him impeccable.

As has been seen, the nationality of a Muslim changes with a change of the basis on which it rest. Thus the nationality of a Muslim is changed if he turns an apostate. Similarly a Zimmi loses his nationality of Darul Harb if he ceases to abide by the injunctions of Islam or goes away to Darul Harb for good.

A man's wife is subject to him by virtue of wedlock. But this alone does not change her nationality. If a Muslim or Zimmi marries a Harbi Woman in Darul Harb during the war her nationality would not be linked with that of her husband unless she is taken to Darul Islam. It is by dint of marriage and migration to Darul Islam that she would acquire the status of a Zimmi. If a protected person marries a Zimmi woman in Darul Harb, he will not correspondingly become a Zimmi himself; nor will his wife turn

a Harbi because of her union with him, save the protected person agrees to settle down in Darul Harb permanently or the Zimmi woman moves to Darul Harb along with her husband. If a woman of Darul Harb is contracted into marriage by a Muslim and joins the fold of Islam herself, her nationality will automatically change without her migration to Darul Islam; for nationality changes merely by embracing Islam. In other words, marriage is not the cause of change of nationality. The real cause thereof is the profession of Islamic faith, acceptance of Islamic injunctions and permanent settlement in Darul Islam Change of a man's nationality does not in itself affect the nationality of his wife. Thus if a Zimmi settles down in Darul Harb but his wife does not go to join him there she will remain a Zimmi. Again, if a Muslim turns an apostate, he will become a Harbi. But this change of nationality will not prejudice the status of his wife unless she also turns an apostate.

The nationality of children is governed by the nationality of parents. So is it also the case with individuals subject to the same rule as children such as persons of unsound mind who are subject to their guardians or heirs. Thus if parents embrace Islam or are contracted into the custody of Darul Islam, their children with nascent minds will be subject to their nationality. If the father alone embraces Islam or is contracted into the custody of Muslims, his immature children will be governed by his status. But jurists differ in the case of the mother who alone embraces Islam or is contracted into the safe custody of Muslims. According to Imam Abu Hanifa, Shafi'ee and Ahmed children in such a case will be subject to mother's position, while Imam Malik considers them subject to the father's nationality according to the foregoing statement, children would be subject to the nationality of parents only when the change of nationality is a change for the better and there can be no nationality nobler than Islam. Says the Holy Prophet (S.A.W.).

"Islam is sublime and there is nothing superior to it." In the light of this tradition, children will not be governed by the nationality of parents if it is changed for the worse, i.e. their

original nationality will remain intact. If a Muslim couple turns apostate and becomes Harbi, their immature children would remain Muslim. The same injunction would apply when either of them turns an apostate.

These then are the general principles as laid down in the Shariah with regard to nationality. There are other particulars too pertaining to this problem, but they have no relevance here. The modern laws have adopted almost identical principles relating to problems of nationality. According to these laws, nationality is grounded in regional identity. A person permanently residing in a country is its national. This is the same thing as settling down in Darul Islam. Under the modern laws a man who stays in another country for a certain length of time and willingly adopts the nationality thereof loses his original nationality. Nationality of a woman is under specific conditions subject to that of her husband's and small children as a general rule are subject to the nationality of their parents.

1. (a) *Al-Mughni*, Vol.10. p.93-96.
   (b) *Mujllalh-ul-Qanoon Wal Iqtisad* p.11 and p.14.
   (c) *Sharh-al-Zurqanii*, Vol.8, p. 69.
   (d) *Ansa-al-Matalib*, Vol.4, p.123.

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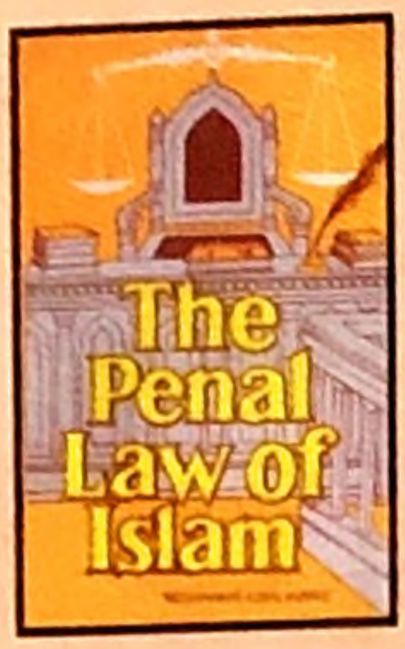
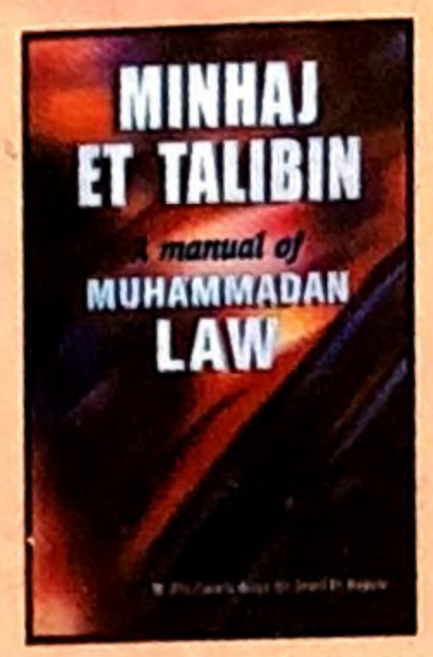
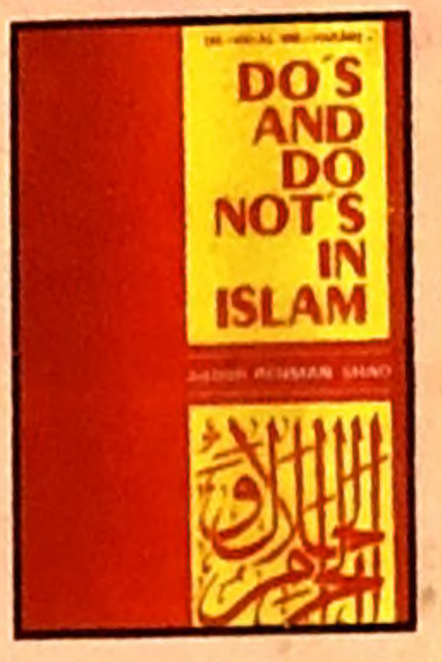
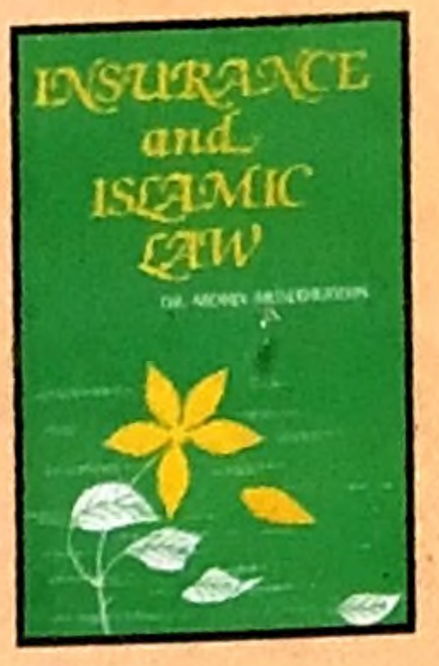
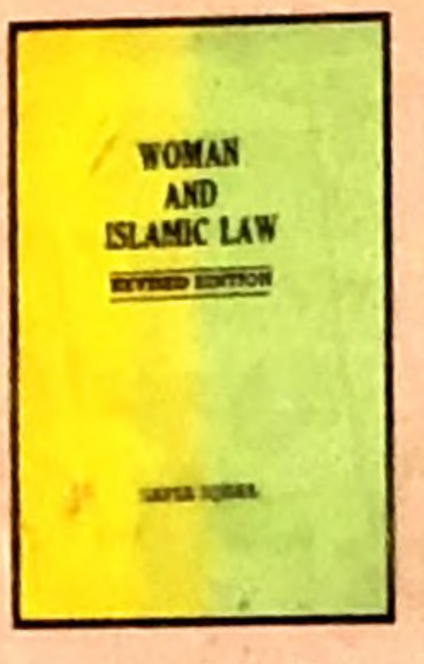
Important Persons, Places and References

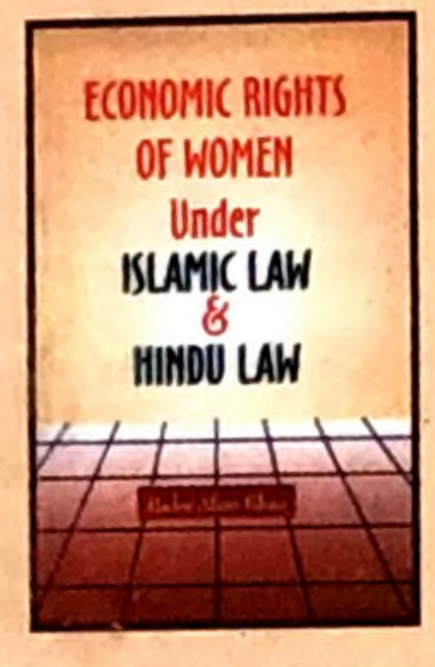


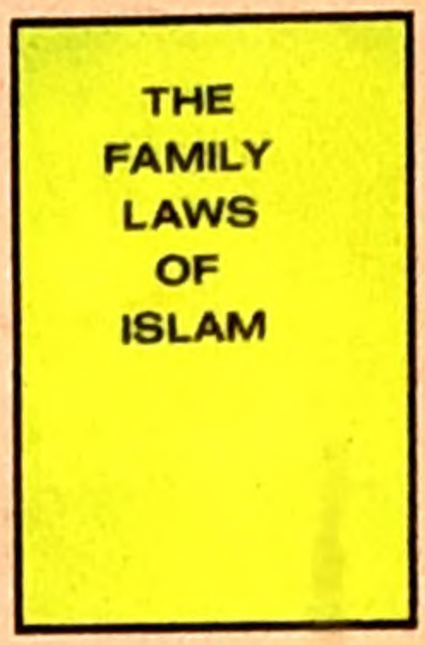


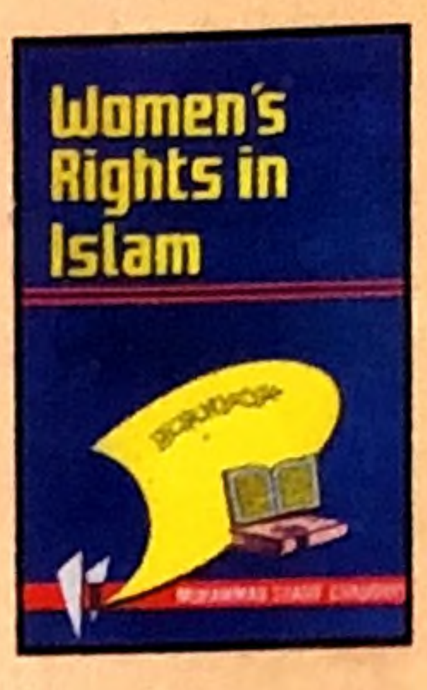


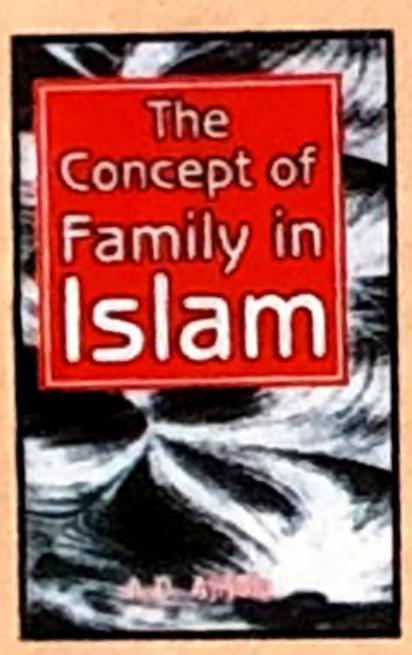


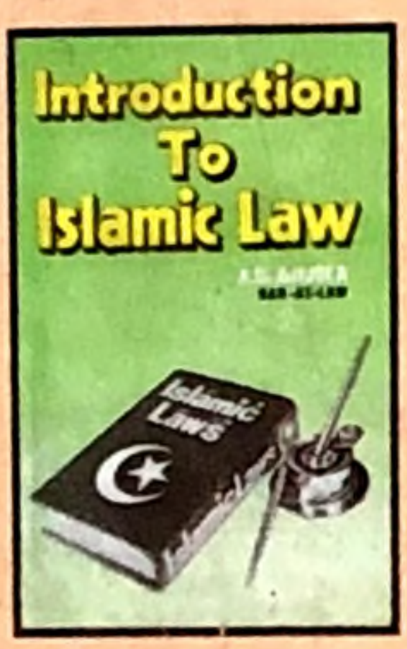


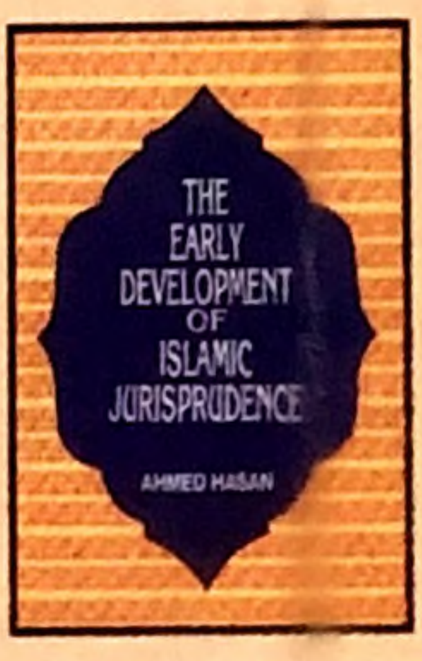


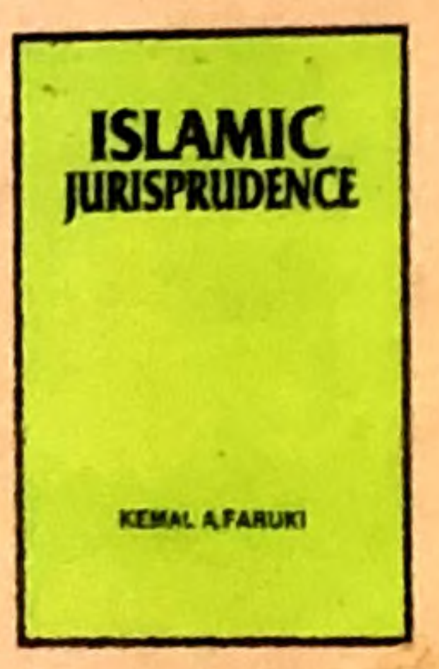


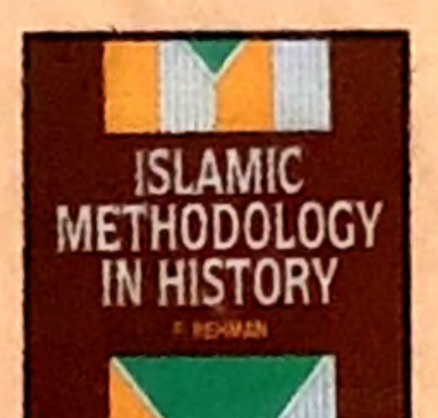












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